TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 238

H. A. LOTT, ET AL., PETITIONERS,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 15, 1960
CERTIORARI GRANTED OCTOBER 10, 1960

SUPREME COURT OF THE UNITED STATES

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[fol. i1]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

Holding Sessions at Houston

UNITED STATES OF AMERICA,

VS.

RICHARD A. FARNSWORTH, SR., LEE BLOCKER, H. A. LOTT, ALAN FARNSWORTH, and LORN D. FRAZIER.

No. 13,298 Criminal.

CAPTION

Be It Remembered: That in the above entitled and numbered cause, lately pending in said Court, in which Final Judgments and Sentences were rendered at the Regular February 1959 Term of said Court, to-wit: On the 19th day of June A. D., 1959, the Honorable Allen B. Hannay, Judge of the United States District Court for the Southern District of Texas, presiding, the following proceedings were had, to-wit:

IN UNITED STATES DISTRICT COURT

INDICTMENT

The Grand Jury Charges:

That in the Houston Division of the Southern District of Texas and within the jurisdiction of this Court, one Richard A. Farnsworth, Sr., Chairman of the Board of Directors of Farnsworth & Company, Inc., Lee Blocker, Treasurer of Farnsworth & Chambers Company, Inc., H. A. Lott, Vice President of Farnsworth & Chambers Company, Inc., Alan Farnsworth, Purchasing Agent and Employee of Farnsworth & Chambers Company, Inc., and Lorn D. Frazier, Vice President of Farnsworth & Chambers

Company, Inc., all hereinafter called defendants and all respectively in the year 1951 were employed by Farnsworth & Chambers Company, Inc., a corporation engaged [fol. 12] in the general contracting business in the State of Texas by virtue of a permit issued by the State of Texas, did wilfully and knowingly attempt to evade and defeat a large part of the taxes due and owing by Farnsworth & Chambers Company, Inc., to the United States of America for the calendar year 1951, by falsifying and altering, and causing to be falsified and altered, invoices, books and records, memorandums, and other documents of Farnsworth & Chambers Company, Inc., at Houston, Texas, and approving and causing to be approved false invoices and documents at Houston, Texas, and concealing and causing to be concealed assets of Farnsworth & Chambers Company, Inc., at Houston, Texas, and diverting and causing to be diverted net income of Farnsworth & Chambers Company, Inc., at Houston, Texas, and concealing and causing to be concealed income of Farnsworth & Chambers Company, Inc., at Houston, Texas, and preparing and causing to be prepared, and mailing and causing to be mailed at Houston, Texas, a false and fraudulent corporate income tax return on behalf of Farnsworth & Chambers Company, Inc., at Houston, Texas for the calendar year of 1951, which was filed on or about April 16, 1952 with the Collector of Internal Revenue for the First Internal Revenue District at Austin, Texas, wherein it was stated that the net income of the said corporation for the said calendar year of 1951 was the sum of $399,135.98, and that the total amount of tax due thereon was the sum of $194,482.66, whereas, as they then and there well knew the net income of the corporation for the said calendar year of 1951 was the sum of $763,599.62 upon which said net income the corporation owed to the United States of America a total tax of $482,278.96, in violation of Section [fol. 13] 145(b) of the Internal Revenue Code of 1939: 26 U.S.C. 145(b).

Second Count.

That in the Houston Division of the Southern District of Texas and within the jurisdiction of this Court, one

Richard A. Farnsworth, Sr., Chairman of the Board of Directors of Farnsworth & Chambers Company, Inc., Lee Blocker, Treasurer of Farnsworth & Chambers Company, Inc., H. A. Lott, Vice President of Farnsworth & Chambers Company, Inc., Alan Farnsworth, Purchasing Agent and Employee of Farnsworth & Chambers Company, Inc., and Lorn D. Frazier, Vice President of Farnsworth & Chambers Company, Inc., all hereinafter called defendants and all respectively in the year 1952 were employed by Farnsworth & Chambers Company, Inc., a corporation engaged in the general contracting business in the State of Texas by virtue of a permit issued by the State of Texas, did wilfully and knowingly attempt to evade and defeat a large part of the taxes due and owing by Farnsworth & Chambers Company, Inc., to the United States of America for the calendar year 1952, by falsifying and altering, and causing to be falsified and altered, invoices, books and records, memorandums, and other documents of Farnsworth & Chambers Company, Inc., at Houston, Texas, and approving and causing to be approved false invoices and documents at Houston, Texas, and concealing and causing to be concealed assets of Farnsworth & Chambers Company, Inc., at Houston, Texas, and diverting and causing to be diverted net income of Farnsworth & Chambers Company, Inc., at Houston, Texas, and concealing and [fol. 14] causing to be concealed income of Farnsworth & Chambers Company, Inc., at Houston, Texas, and preparing and causing to be prepared, and mailing and causing to be mailed at Houston, Texas, a false and fraudulent corporate income tax return on behalf of Farnsworth & Chambers Company, Inc., at Houston, Texas for the calendar year of 1952, which was filed on or about May 12, 1953 with the District Director of Internal Revenue for the Austin District of the Internal Revenue Service at Austin, Texas, wherein it was stated that the net income of the said corporation for the said calendar year of 1952 was the sum of $410,937.87, and that the total amount of tax due thereon was the sum of $207,135.40, whereas, as they then and there well knew the net income of the corporation for the said calendar year of 1952 was the sum of $495,-

528.77, upon which said net income the corporation owed to the United States of America a total tax of $251,122.66, in violation of Section 145(b) of the Internal Revenue Code of 1939: 26 U.S.C. 145(b).

Third Count.

That in the Houston Division of the Southern District of Texas and within the jurisdiction of this Court, one Richard A. Farnsworth, Sr., Chairman of the Board of Directors of Farnsworth & Chambers Company, Inc., Lee Blocker, Treasurer of Farnsworth & Chambers Company, Inc., H. A. Lott, Vice President of Farnsworth & Chambers Company, Inc., Alan Farnsworth, Purchasing Agent and Employee of Farnsworth & Chambers Company, Inc., and Lorn D. Frazier, Vice President of Farnsworth & Chambers Company, Inc., all hereinafter called defendants and all respectively in the year 1953 were employed by Farns- [fol. 15] worth & Chambers Company, Inc., a corporation engaged in the general contracting business in the State of Texas by virtue of a permit issued by the State of Texas, did wilfully and knowingly attempt to evade and defeat a large part of the taxes due and owing by Farnsworth & Chambers Company, Inc., to the United States of America for the calendar year 1953, by falsifying and altering, and causing to be falsified and altered, invoices, books and records, memorandums, and other documents of Farnsworth & Chambers Company, Inc., at Houston, Texas, and approving and causing to be approved false invoices and documents at Houston, Texas, and concealing and causing to be concealed assets of Farnsworth & Chambers Company, Inc., at Houston, Texas, and diverting and causing to be diverted net income of Farnsworth & Chambers Company, Inc., at Houston, Texas, and concealing and causing to be concealed income of Farnsworth & Chambers Company, Inc., at Houston, Texas, and preparing and causing to be prepared, and mailing and causing to be mailed at Houston, Texas, a false and fraudulent corporate income tax return on behalf of Farnsworth & Chambers Company, Inc., at Houston, Texas for the calendar year of 1953, which was filed on or about May 24, 1954 with the District Director of Internal Revenue

for the Austin District of the Internal Revenue Service at Austin, Texas, wherein it was stated that the net income of the said corporation for the said calendar year of 1953 was the sum of $179,628.93, and that the total amount of tax due thereon was the sum of $87,907.04, whereas, as they then and there well knew the net income of the corporation for the said calendar year of 1953 was the sum of $362,929.90, upon which said net income the corporation owed to the United States of America a total [fol. 16] tax of $183,223.55, in violation of Section 145(b) of the Internal Revenue Code of 1939: 26 U.S.C. 145(b).

Fourth Count.

That in the Houston Division of the Southern District of Texas and within the jurisdiction of this Court, one Richard A. Farnsworth, Sr., Chairman of the Board of Directors of Farnsworth & Chambers Company, Inc., Lee Blocker, Treasurer of Farnsworth & Chambers Company, Inc., H. A. Lott, Vice President of Farnsworth & Chambers Company, Inc., Alan Farnsworth, Purchasing Agent and Employee of Farnsworth & Chambers Company, Inc., and Lorn D. Frazier, Vice President of Farnsworth & Chambers Company, Inc., all hereinafter called defendants and and all respectively in the year 1954 were employed by Farnsworth & Chambers Company, Inc., a corporation engaged in the general contracting business in the State of Texas by virtue of a permit issued by the State of Texas, did wilfully and knowingly attempt to evade and defeat a large part of the taxes due and owing by Farnsworth & Chambers Company, Inc., to the United States of America for the calendar year 1954, by falsifying and altering, and causing to be falsified and altered, invoices, books and records, memorandums, and other documents of Farnsworth & Chambers Company, Inc , at Houston, Texas, and approving and causing to be approved false invoices and documents at Houston, Texas, and concealing and causing to be concealed assets of Farnsworth & Chambers Company, Inc., at Houston, Texas, and diverting and causing to be diverted net income of Farnsworth & Chambers Company, Inc., at Houston, Texas, and concealing and causing

to be concealed income of Farnsworth & Chambers Com-
[fol. 17] pany, Inc., at Houston, Texas, and preparing and causing to be prepared, and mailing and causing to be mailed at Houston, Texas, a false and fraudulent corporate income tax return on behalf of Farnsworth & Chambers Company, Inc., at Houston, Texas for the calendar year of 1954, which was filed on or about March 14, 1955 with the District Director of Internal Revenue for the Austin District of the Internal Revenue Service at Austin, Texas, wherein it was stated that the net income of the said corporation for the said calendar year of 1954 was the sum of $282,441.03, and that the total amount of tax due thereon was the sum of $135,797.53, whereas, as they then and there well knew the net income of the corporation for the said calendar year of 1954 was the sum of $406,898.80, upon which said net income the corporation owed to the United States of America a total tax of $200,515.57, in violation of Section 7201, of the Internal Revenue Code of 1954: 26 U.S.C. 7201.

Fifth Count.

That on or about the 1st day of January of 1950, the exact date to the Grand Jurors unknown and continuously thereafter up unto and including the 14th day of March of 1955, in the Southern District of Texas, Houston Division and within the jurisdiction of this Court and other Judicial Districts of the United States of America, Richard A. Farnsworth, Sr., Lee Blocker, H. A. Lott, Lorn D. Frazier, and Alan Farnsworth, all of Houston, Texas, all hereinafter called defendants, did unlawfully, knowingly, wilfully and feloniously conspire, combine, confederate and agree together, with each other and Dunbar N. Chambers, deceased, not indicated herein, and divers other persons
[fol. 18] whose names are to the Grand Jurors unknown to violate Section 145(b) of the Internal Revenue Code of 1939, Section 145(b), Title 26, United States Code and Section 7201 of the Internal Revenue Code of 1954, Section 7201, Title 26, United States Code, to-wit: To wilfully attempt to evade and defeat a large part of the income taxes due and owing to the United States of America

by Farnsworth & Chambers Company, Inc., for the calendar years of 1951, 1952, 1953 and 1954 under circumstances and by the means and other manner following:

That at all times material herein:

1. Farnsworth & Chambers Company, Inc., a corporation engaged in the business of general contracting work in the State of Texas, as permitted by the State of Texas, with its principal office in Texas situated at Houston, Texas;

2. Richard A. Farnsworth, Sr., was Chairman of the Board of Directors of Farnsworth & Chambers Company, Inc.;

3. Lee Blocker was Treasurer of Farnsworth & Chambers Company, Inc.;

4. H. A. Lott was Vice President of Farnsworth & Chambers Company, Inc.;

5. Lorn D. Frazier was Vice President of Farnsworth & Chambers Company, Inc., and

6. Alan Farnsworth was Purchasing Agent and Employee of Farnsworth & Chambers Company, Inc.

[fol. 19] A. It was part of said conspiracy to falsify and alter books and records, memorandums, bills and receipts and documents of Farnsworth & Chambers Company, Inc.

B. It was further a part of the conspiracy to approve falsified invoices, bills, memorandums and documents for payment by Farnsworth & Chambers Company, Inc.

C. It was further a part of the conspiracy that defendants would conceal purchases of assets of Farnsworth & Chambers Company, Inc., by representing that payments for such assets were for rentals, repair expenses, parts expenses and materials used in construction work by Farnsworth & Chambers Company, Inc.

D. It was further a part of the conspiracy to alter and delete the true records of the corporation for the purpose of concealing the true net income of the corporation.

That the Grand Jurors further charge that at the times and at the places herein named, in furtherance of the object, design and purpose of such conspiracy, the defendants hereinafter named did do and perform the following overt acts:

Overt Acts.

1. Each of the overt acts alleged in the preceding four counts of this indictment, in the respective dates and places alleged therein.

[fol. 20] 2. That on or about April 16, 1952, Richard A. Farnsworth, Sr., Lee Blocker, H. A. Lott, Alan Farnsworth and Lorn D. Frazier filed and caused to be filed a corporate income tax return on behalf of Farnsworth & Chambers Company, Inc., with the Collector of Internal Revenue for the First Internal Revenue District at Austin, Texas.

3. That on or about May 12, 1953, Richard A. Farnsworth, Sr., Lee Blocker, H. A. Lott, Alan Farnsworth and Lorn D. Frazier filed and caused to be filed a corporate income tax return on behalf of Farnsworth & Chambers Company, Inc., with the District Director of Internal Revenue for the Austin District of the Internal Revenue Service at Austin, Texas.

4. That on or about May 24, 1954, Richard A. Farnsworth, Sr., Lee Blocker, H. A. Lott, Alan Farnsworth and Lorn D. Frazier filed and caused to be filed a corporate income tax return on behalf of Farnsworth & Chambers Company, Inc., with the District Director of Internal Revenue for the Austin District of the Internal Revenue Service at Austin, Texas.

5. That on or about March 14, 1955, Richard A. Farnsworth, Sr., Lee Blocker, H. A. Lott, Alan Farnsworth and Lorn D. Frazier filed and caused to be filed a corporate income tax return on behalf of Farnsworth & Chambers Company, Inc., with the District Director of Internal Revenue for the Austin District of the Internal Revenue Service at Austin, Texas.

6. On or about June 5, 1951, Richard A. Farnsworth, Sr., approved an invoice labeled "Requisition No. 12" showing Al Bubeck to be payee.

[fol. 21] 7. On or about December 31, 1951, Richard A. Farnsworth, Sr., in Houston, Texas, approved Voucher No. 47071 payable to Acme Airco No. 1 for one Amana freezer.

8. On or about January 24, 1953 in Houston, Texas, Richard A. Farnsworth, Sr., approved Voucher No. 70860 for work on a residence.

9. On or about May 4, 1954, Richard A. Farnsworth, Sr., at Houston, Texas, approved an invoice supporting Voucher No. 07490.

10. On or about April 28, 1952, Lorn D. Frazier approved an alleged invoice from Sim D. Brown.

11. On or about November 1, 1953, Lorn D. Frazier approved an alleged invoice from Herman Knox Furniture Company.

12. On or about November 25, 1952, Lorn D. Frazier approved an invoice from B. A. Hoffman.

13. On or about November 29, 1950, H. A. Lott approved Invoice No. 31701 from the National Sash and Door Company.

14. On or about May 15, 1951, H. A. Lott approved Invoice No. 10338 from the Coastal Equipment Company, Inc.

15. On or about February 25, 1952, H. A. Lott approved an alleged invoice from Sim D. Brown.

[fol. 22] 16. On or about September 26, 1953, H. A. Lott approved an invoice from G. V. Robles & Sons.

17. On or about March 31, 1954, H. A. Lott approved an alleged invoice from the Alamo Lumber Company.

18. On or about May 7, 1953, Lee Blocker at Houston, Texas, signed his name to the 1952 Corporation Income

Tax Return as Treasurer of Farnsworth & Chambers Company, Inc.

19. On or about May 10, 1954, Lee Blocker at Houston, Texas, signed his name to the 1953 Corporation Income Tax Return as Treasurer of Farnsworth & Chambers Company, Inc.

20. On or about March 8, 1955, Lee Blocker at Houston, Texas, signed his name to the 1954 Corporation Income Tax Return as Treasurer of Farnsworth & Chambers Company, Inc.

21. On or about November 1, 1950, Lee Blocker approved Invoice No. 3664 alleged to be from the Coastal Equipment Company, Inc.

22. On or about December 31, 1951, Lee Blocker prepared Journal Voucher 654.

23. On or about June 2, 1951, Alan Farnsworth approved an invoice from the Hollywood Overhead Door Co.

24. On or about February 25, 1951, Alan Farnsworth approved a weekly field payroll charged to the Reagan School job.

[fol. 23] 25. On or about May 19, 1953, Alan Farnsworth approved an invoice from the Houston Iron & Steel Company.

26. On or about January 2, 1954, Alan Farnsworth approved an invoice from the Barber, Inc.

That the acts aforesaid were and are in violation of Section 371, Title 18, United States Code.

Ed Helman, Foreman of the Grand Jury.

Fred L. Hartman, Assistant United States Attorney.

FLH:cp

[fol. 24]

IN UNITED STATES DISTRICT COURT

CLERK'S DOCKET ENTRY ON ARRAIGNMENT—
Entered April 24, 1958

All defendants Arraigned, subject to filing their motions (ABH).

All defendants plead Not Guilty. Trial to be set at later date.

Government given 30 days to answer defendants' motions.

[fol. 219]

IN UNITED STATES DISTRICT COURT

BILL OF PARTICULARS—Filed 19 day of July, 1958

Comes Now the United States of America, plaintiff in the above entitled suit and without waiving its objections heretofore filed to all of the above defendants' motions for bill of particulars, but expressly reserving the same, and without prejudice to the Government's filing an amended bill of particulars that may replace this bill in whole or in part, agrees to furnish voluntarily this bill of particulars. This bill is furnished in the interest of further facilitating the trial of the case. The Government herein, realleges, however, that all of the matters listed below are fully within the knowledge of the defendants, their attorneys, their accountants and their business associates. This knowledge is revealed in part in the motions for severance filed by certain defendants.

I.

The Government will rely upon the "specific items" theory of proof and will not resort to the net worth theory of proof. The nature and sources of the primary groups of items is as follows:

II.

The evasion of taxes for the years in question by the defendants and by the means enumerated in the indictment resulted in part from the omission of income by Farnsworth and Chambers, Inc., from its construction and [fol. 220] related activities, including but not limited to building roads, grading ditches, building driveways, building a swimming pool, clearing timber and/or the sale of same—all in the approximate amount of $71,136.00 for the tax years in question.

III.

The evasion of taxes resulted in part from the over statement of construction costs and expenses of Farnsworth and Chambers Company, Inc., by allocation of personal expenditures of all defendants and other corporate executives, both living and deceased, to corporate construction costs and expenses, in the approximate amount of $324,877.00 for the tax years in question.

IV.

The evasion of taxes resulted in part from the concealment of asset acquisitions, by showing them on their books and records as construction costs and expenses of Farnsworth and Chambers Company, Inc.

V.

The evasion of taxes resulted in part from the contion (sic) as construction costs and expenses by Farnsworth and Chambers Company, Inc., of expenditures made by Farnsworth and Chambers Company, Inc., for other corporations in the approximate amount of $525,643.00.

VI.

The evasion of taxes was due in part to the acquisition of corporate assets by Farnsworth and Chambers Com-[fol. 221] pany, Inc., under the subterfuge of paying corporate expenses and construction costs.

Wherefore, premises considered, the United States having voluntarily furnished and stated the above primary specific items, among others, upon which it will rely, it should not be compelled to even further disclose its evidence and proof prior to trial. This for the cogent reasons stated more particularly in its reply to the respective motions of the above defendants.

Respectfully submitted,

William B. Butler, United States Attorney; Fred L. Hartman, Assistant United States Attorney; Newton B. Schwartz, Assistant United States Attorney.

Proof of Service (omitted in printing).

[fol. 223]

IN UNITED STATES DISTRICT COURT

MOTION FOR SUPPLEMENTAL BILL OF PARTICULARS—
Filed 7 day of August, 1958

To the Honorable District Court:

Now Come Lee Blocker and Lorn D. Frazier, defendants, and, pursuant to Rule 7 (f) Federal Rules of Criminal Procedure, request the Court to order the Government to file a supplemental bill of particulars, and in support of this motion respectfully show:

1.

The motion for a bill of particulars previously filed by Lee Blocker and Lorn D. Frazier and the motion for oral argument thereon have not been acted upon by the Court.

2.

An answer to the motion for bill of particulars, which was filed in behalf of the United States of America, asserted that these defendants have no right to particulars to aid them in their defense to the charges in the indict-

ment and to avoid the risk of prosecution twice for the same alleged offense.

3.

In contradiction to these assertions contained in the answer to the bill of particulars, the Government filed a bill of particulars which is in reality a bill of generalities [fol. 224] wholly failing to apprise these defendants of the specific acts of criminal conduct which these defendants will be called upon to defend.

4.

The Bill of Particulars filed by the Government discloses that it intends to prove "specific items" of criminal conduct against the defendants. No adequate defense can be prepared unless these defendants are apprised of what the "specific items" are. Defendants seek not to ascertain the Government's evidence by which it intends to prove the specific items, but identification of these specific transactions.

5.

The motion for bill of particulars previously filed is hereby reasserted and adopted in its entirety in order that these defendants may prepare their defenses, avoid surprises and be apprised of facts, if any, which are relied upon by the Government to support the conclusions alleged in the indictment.

Wherefore, premises considered, these defendants pray that their motions for particulars be in all things granted, and that they have such other relief which justice may require.

Fulbright, Crooker, Freeman, Bates & Jaworski,
By Charles M. Haden, M. S. McCorquodale, Attorneys for Lee Blocker and Lorn D. Frazier.

Bank of the Southwest Building, Houston 2, Texas.

[fol. 346]

IN UNITED STATES DISTRICT COURT

ORDER DENYING DEFENDANTS' MOTIONS—January 26, 1959

"1-26-59: Motion for Bill of Particulars on behalf of Defendants Richard A. Farnsworth, Sr., and Alan Farnsworth Denied and Overruled.

Motion for separate trial on behalf of Defendant H. A. Lott, Denied and Overruled.

[fol. 347] Motion for Bill of Particulars on behalf of Defendant H. A. Lott, Denied and Overruled.

Motion of Defendants Lee Blocker and Lorn D. Frazier to Dismiss Indictment Denied and Overruled.

Motion for Bill of Particulars of Lee Blocker and Lorn D. Frazier Denied and Overruled.

Motion for Severance of Lee Blocker and Lorn D. Frazier Denied and Overruled.

Motion for Supplemental Bill of Particulars of Defendants Lee Blocker and Lorn D. Frazier Denied and Overruled.

Clerk will notify counsel.

(S.) Allen B. Hannay, U. S. District Judge."

[fol. 443]

IN UNITED STATES DISTRICT COURT

Proceedings on Rearraignment of Defendants Lee Blocker and Lorn D. Frazier

APPEARANCES

William B. Butler, Esq., United States Attorney, Post Office Building, Houston, Texas. Fred L. Hartman, Esq., Assistant United States Attorney, Post Office Building, Houston, Texas, For the Government.

John H. Crooker, Esq., Fulbright, Crooker, Freeman, Bates and Jaworski, Bank of the Southwest Building, Houston, Texas, Joe S. Moss, Esq., Esperson Building, Houston, Texas, For the Defendants.

Proceedings

Morning Session—March 17, 1959

COLLOQUY BETWEEN COURT AND COUNSEL RE ENTRY OF PLEAS OF NOLO CONTENDERE

The Court: Judge Crooker, I understand you had some business with the Court this morning?

Mr. Crooker: I think Mr. Moss will address the Court, Your Honor.

[fol. 444] Mr. Moss: May the clients and I approach the bench?

The Court: Certainly.

Mr. Moss: May it please the Court, this gentleman on my left is Lorn Frazier and this is Mr. Lee Blocker. These are the only two defendants in this particular matter that I represent, and each of these gentlemen desire to enter before Your Honor a plea of nolo contendere to each count of the indictment and respectfully request the Court to accept this plea on this occasion.

The Court: What says the Government?

Mr. Butler: If the Court please, the Government objects to the entrance of a plea of nolo contendere.

It is the Government's position, both from instructions from the Attorney General and my own personal feelings, in

a criminal matter of this kind, it is not proper for the defendants to be punished if they are not guilty and if they are guilty they should plead guilty and the nolo plea is a plea that should not be accepted by the Court. They should plead guilty or not guilty.

Mr. Hartman has some additional matters that he would like to say to the Court.

[fol. 445] Mr. Hartman: May it please Your Honor, a nolo plea is rather unique. It is somewhat different from a guilty or not guilty plea. In that connection, these defendants have insisted on their innocence from the outset of this case. A man can change his mind, but ordinarily that requires a confession. In a nolo plea, the man says "I do not wish to contest," which indicates he is in doubt. If that be the case, the ultimate conclusions should be left to a jury to resolve that doubt.

The Court: No, I think that is thoroughly within the discretion of this Court, and I will allow such a plea.

Mr. Hartman: I understand it is a responsibility of the Court, and the origination of such a plea lies with the defendant. That is his privilege. We have no say in the matter. We can only dispose of the case by a plea of guilty or not guilty. There should be some justification for the acceptance of such a plea of nolo contendere, and it should spring from the defendants. It must come from them.

The Court: Is it not true there are other litigations pending in either State or Federal Courts in which the question of guilty would possibly be an admission of some description?

Mr. Hartman: That might be the case, but I think in fairness to the Government defendants should bring that matter before the Court.

[fol. 446] The Court: Hasn't the Fifth Circuit very, very recently said that such a plea is not admissible in either the Federal Court, Civil or Criminal case in a Federal Court?

Mr. Hartman: That being the case and that being the law, it still would not be justification.

The Court: I differ with you on that. I will allow the plea. Will you arraign the defendants?

Mr. Hartman: The Grand Jury charges in Count One that in the Houston Division of the Southern District of

Texas and within the jurisdiction of this Court, one Richard A. Farnsworth, Sr., Chairman of the Board of Directors of Farnsworth & Company, Inc., Lee Blocker, Treasurer of Farnsworth & Chambers Company, Inc., H. A. Lott, Vice President of Farnsworth & Chambers Company, Inc., Alan Farnsworth, Purchasing Agent and Employee of Farnsworth & Chambers Company, Inc., and Lorn D. Frazier, Vice President of Farnsworth & Chambers Company, Inc., all hereinafter called defendants and all respectively in the year 1951 were employed by Farnsworth & Chambers Company, Inc., a corporation engaged in the general contracting business in the State of Texas by virtue of a permit issued by the State of Texas, did wilfully and knowingly attempt to evade and defeat a large part of the taxes due and owing by Farnsworth & Chambers Company, Inc. to the United States of America for the calendar year 1951, by falsifying and altering, and causing to be falsified and altered, in- [fol. 447] voices, books and records, memorandums, and other documents of Farnsworth & Chambers Company, Inc. at Houston, Texas, and approving and causing to be approved false invoices and documents at Houston, Texas, and concealing and causing to be concealed assets of Farnsworth & Chambers Company, Inc. at Houston, Texas, and diverting and causing to be diverted net income of Farnsworth & Chambers Company, Inc. at Houston, Texas, and concealing and causing to be concealed income of Farnsworth & Chambers Company, Inc. at Houston, Texas, and preparing and causing to be prepared, and mailing and causing to be mailed at Houston, Texas, a false and fraudulent corporate income tax return on behalf of Farnsworth & Chambers Company, Inc. at Houston, Texas for the calendar year of 1951, which was filed on or about April 16, 1952 with the Collector of Internal Revenue for the First Internal Revenue District at Austin, Texas, wherein it was stated that the net income of the said corporation for the said calendar year of 1951 was the sum of $399,135.98, and that the total amount of tax due thereon was the sum of $194,482.66, whereas, as they then and there well knew the net income of the corporation for the said calendar year of 1951 was the sum of $763,599.62 upon which said net income the corporation owed to the United States of Amer-

ica a total tax of $482,278.96, in violation of Section 145(b) of the Internal Revenue Code of 1939: 26 U.S.C. 145(b).

Mr. Blocker, how do you plead to Count One of the indictment?

Defendant Blocker: Nolo.

[fol. 448] Mr. Hartman: Mr. Frazier, how do you plead?

Defendant Frazier: Nolo contendere.

Mr. Hartman: Count Two: That in the Houston Division of the Southern District of Texas and within the jurisdiction of this Court, one Richard A. Farnsworth, Sr., Chairman of the Board of Directors of Farnsworth & Chambers Company Inc., Lee Blocker, Treasurer of Farnsworth & Chambers Company, Inc., H. A. Lott, Vice President of Farnsworth & Chambers Company, Inc., Alan Farnsworth, Purchasing Agent and Employee of Farnsworth & Chambers Company, Inc., and Lorn D. Frazier, Vice President of Farnsworth & Chambers Company, Inc., all hereinafter called defendants and all respectively in the year 1952 were employed by Farnsworth & Chambers Company, Inc., a corporation engaged in the general contracting business in the State of Texas by virtue of a permit issued by the State of Texas, did wilfully and knowingly attempt to evade and defeat a large part of the taxes due and owing by Farnsworth & Chambers Company, Inc. to the United States of America for the calendar year 1952, by falsifying and altering and causing to be falsified and altered, invoices, books and records, memorandums, and other documents of Farnsworth & Chambers Company, Inc. at Houston, Texas, and approving and causing to be approved false invoices and documents at Houston, Texas, and concealing and causing to be concealed assets of Farnsworth & Chambers Company, Inc. at Houston, Texas, and diverting [fol. 449] and causing to be diverted net income of Farnsworth & Chambers Company, Inc. at Houston, Texas, and concealing and causing to be concealed income of Farnsworth & Chambers Company, Inc. at Houston, Texas, and preparing and causing to be prepared, and mailing and causing to be mailed at Houston, Texas, a false and fraudulent corporate income tax return on behalf of Farnsworth & Chambers Company, Inc. at Houston, Texas for the calendar year of 1952, which was filed on or about May 12,

1953 with the District Director of Internal Revenue for the Austin District of the Internal Revenue Service at Austin, Texas, wherein it was stated that the net income of the said corporation for the said calendar year of 1952 was the sum of $410,937.87, and that the total amount of tax due thereon was the sum of $207,135.40, whereas, as they then and there well knew the net income of the corporation for the said calendar year of 1952 was the sum of $495,528.77, upon which said net income the corporation owed to the United States of America a total tax of $251,122.66, in violation of Section 145(b) of the Internal Revenue Code of 1939: 26 U.S.C. 145(b).

Mr. Blocker, how do you plead to Count Two of the indictment?

Defendant Blocker: Nolo contendere.

Mr. Hartman: Mr. Frazier, how do you plead to Count Two of the indictment?

Defendant Frazier: Nolo contendere.

[fol. 450] Mr. Hartman: Count Three: That in the Houston Division of the Southern District of Texas and within the jurisdiction of this Court, one Richard A. Farnsworth, Sr., Chairman of the Board of Directors of Farnsworth & Chambers Company, Inc., Lee Blocker, Treasurer of Farnsworth & Chambers Company, Inc., H. A. Lott, Vice President of Farnsworth & Chambers Company, Inc., Alan Farnsworth, Purchasing Agent and Employee of Farnsworth & Chambers Company, Inc., and Lorn D. Frazier, Vice President of Farnsworth & Chambers Company, Inc., all hereinafter called defendants and all respectively in the year 1953 were employed by Farnsworth & Chambers Company, Inc., a corporation engaged in the general contracting business in the State of Texas by virtue of a permit issued by the State of Texas, did wilfully and knowingly attempt to evade and defeat a large part of the taxes due and owing by Farnsworth & Chambers Company, Inc. to the United States of America for the calendar year 1953, by falsifying and altering, and causing to be falsified and altered, invoices, books and records, memorandums, and other documents of Farnsworth & Chambers Company, Inc. at Houston, Texas, and approving and causing to be approved false invoices and documents at Houston, Texas,

and concealing and causing to be concealed assets of Farnsworth & Chambers Company, Inc. at Houston, Texas, and diverting and causing to be diverted net income of Farnsworth & Chambers Company, Inc. at Houston, Texas, and concealing and causing to be concealed income of Farnsworth & Chambers Company, Inc. at Houston, Texas, and preparing and causing to be prepared, and mailing and causing to be mailed at Houston, Texas, a false and fraudu- [fol. 451] lent corporate income tax return on behalf of Farnsworth & Chambers Company, Inc. at Houston, Texas for the calendar year of 1953, which was filed on or about May 24, 1954 with the District Director of Internal Revenue for the Austin District of the Internal Revenue Service at Austin, Texas, wherein it was stated that the net income of the said corporation for the said calendar year of 1953 was the sum of $179,628.93, and that the total amount of tax due thereon was the sum of $87,907.04, whereas, as they then and there well knew the net income of the corporation for the said calendar year of 1953 was the sum of $362,-929.90, upon which said net income the corporation owed to the United States of America a total tax of $183,223.55, in violation of Section 145(b) of the Internal Revenue Code of 1939: 26 U.S.C. 145(b).

Mr. Blocker, how do you plead to Count Three of the indictment?

Defendant Blocker: Nolo contendere.

Mr. Hartman: Mr. Frazier how do you plead to Count Three of the indictment?

Defendant Frazier: Nolo contendere.

Mr. Hartman: Count Four: That in the Houston Division of the Southern District of Texas and within the jurisdiction of this Court, one Richard A. Farnsworth, Sr., Chairman of the Board of Directors of Farnsworth & Chambers Company, Inc., Lee Blocker, Treasurer of Farnsworth [fol. 452] & Chambers Company, Inc., H. A. Lott, Vice President of Farnsworth & Chambers Company, Inc., Alan Farnsworth, Purchasing Agent and Employee of Farnsworth & Chambers, Inc., and Lorn D. Frazier, Vice President of Farnsworth & Chambers Company, Inc., all hereinafter called defendants and all respectively in the year 1954 were employed by Farnsworth & Chambers Company,

Inc., a corporation engaged in the general contracting business in the State of Texas by virtue of a permit issued by the State of Texas, did wilfully and knowingly attempt to evade and defeat a large part of the taxes due and owing by Farnsworth & Chambers Company, Inc. to the United States of America for the calendar year 1954, by falsifying and altering, and causing to be falsified and altered, invoices, books and records, memorandums and other documents of Farnsworth & Chambers Company, Inc. at Houston, Texas, and approving and causing to be approved false invoices and documents at Houston, Texas, and concealing and causing to be concealed assets of Farnsworth & Chambers, Inc. at Houston, Texas, and diverting and causing to be diverted net income of Farnsworth & Chambers Company, Inc. at Houston, Texas, and concealing and causing to be concealed income of Farnsworth & Chambers Company, Inc. at Houston, Texas, and preparing and causing to be prepared, and mailing and causing to be mailed at Houston, Texas, a false and fraudulent corporate income tax return on behalf of Farnsworth & Chambers Company, Inc. at Houston, Texas for the calendar year of 1954, which was filed on or about March 14, 1955 with the District Director of Internal Revenue for the Austin District of the Internal Revenue Service at Austin, Texas, wherein it was stated that the net income [fol. 453] of the said corporation for the said calendar year of 1954 was the sum of $282,441.03, and that the total amount of tax due thereon was the sum of $135,797.53, whereas, as they then and there well knew the net income of the corporation for the said calendar year of 1954 was the sum of $406,898.80, upon which said net income the corporation owed to the United States of America a total tax of $200,515.57, in violation of Section 7201, of the Internal Revenue Code of 1954: 26 U.S.C. 7201.

Mr. Blocker, how do you plead to Count Four of the indictment?

Defendant Blocker: No contendere.

Mr. Hartman: Mr. Frazier, how do you plead to Count Four of the indictment?

Defendant Frazier: Nolo contendere.

Mr. Hartman: Count Five: That on or about the 1st day of January of 1950, the exact date to the Grand Jurors

unknown and continuously thereafter up unto and including the 14th day of March of 1955, in the Southern District of Texas, Houston Division and within the jurisdiction of this Court and other Judicial Districts of the United States of America, Richard A. Farnsworth, Sr., Lee Blocker, H. A. Lott, Lorn D. Frazier and Alan Farnsworth, all of Houston, Texas, all hereinafter called defendants, did unlawfully, knowingly, wilfully and feloniously conspire, combine, confederate and agree together, with each other and Dunbar N. [fol. 454] Chambers, deceased, not indicted herein, and divers other persons whose names are to the Grand Jurors unknown to violate Section 145(b) of the Internal Revenue Code of 1939, Section 145(b), Title 26, United States Code and Section 7201 of the Internal Revenue Code of 1954, Section 7201, Title 26, United States Code, to-wit: To wilfully attempt to evade and defeat a large part of the income taxes due and owing to the United States of America by Farnsworth & Chambers Company, Inc. for the calendar years of 1951, 1952, 1953 and 1954 under circumstances and by the means and other manner following:

That at all times material herein:

1. Farnsworth & Chambers Company, Inc. a corporation engaged in the business of general contracting work in the State of Texas, as permitted by the State of Texas, with its principal office in Texas situated at Houston, Texas;

2. Richard A. Farnsworth, Sr. was Chairman of the Board of Directors of Farnsworth & Chambers Company, Inc.;

3. Lee Blocker was Treasurer of Farnsworth & Chambers Company, Inc.;

4. H. A. Lott was Vice President of Farnsworth & Chambers Company, Inc.;

5. Lorn D. Frazier was Vice President of Farnsworth & Chambers Company, Inc., and

[fol. 455] 6. Alan Farnsworth was Purchasing Agent and Employee of Farnsworth & Chambers Company, Inc.

A. It was part of said conspiracy to falsify and alter books and records, memorandums, bills and receipts and documents of Farnsworth & Chambers Company, Inc.

B. It was further a part of the conspiracy to approve falsified invoices, bills, memorandums and documents for payment by Farnsworth & Chambers Company, Inc.

C. It was further a part of the conspiracy that defendants would conceal purchases of assets of Farnsworth & Chambers Company, Inc. by representing that payments for such assets were for rentals, repair expenses, parts expenses and materials used in construction work by Farnsworth & Chambers Company, Inc.

D. It was further a part of the conspiracy to alter and delete the true records of the corporation for the purpose of concealing the true net income of the corporation.

That the Grand Jurors further charge that at the times and at the places herein named, in furtherance of the object, design and purpose of such conspiracy, the defendants hereinafter named did do and perform the following overt acts:

1. Each of the overt acts alleged in the preceding four counts of this indictment, in the respective dates and places alleged therein.

[fol. 456] 2. That on or about April 16, 1952, Richard A. Farnsworth, Sr., Lee Blocker, H. A. Lott, Alan Farnsworth and Lorn D. Frazier filed and caused to be filed a corporate income tax return on behalf of Farnsworth & Chambers Company, Inc. with the Collector of Internal Revenue for the First Internal Revenue District at Austin, Texas.

3. That on or about May 12, 1953, Richard A. Farnsworth, Sr., Lee Blocker, H. A. Lott, Alan Farnsworth and Lorn D. Frazier filed and caused to be filed a corporate income tax return on behalf of Farnsworth & Chambers Company, Inc. with the District Director of Internal Revenue for the Austin District of the Internal Revenue Service at Austin, Texas.

4. That on or about May 24, 1954, Richard A. Farnsworth, Sr., Lee Blocker, H. A. Lott, Alan Farnsworth and

Lorn D. Frazier filed and caused to be filed a corporate income tax return on behalf of Farnsworth & Chambers Company, Inc., with the District Director of Internal Revenue for the Austin District of the Internal Revenue Service at Austin, Texas.

5. That on or about March 14, 1955, Richard A. Farnsworth, Sr., Lee Blocker, H. A. Lott, Alan Farnsworth and Lorn D. Frazier filed and caused to be filed a corporate income tax return on behalf of Farnsworth & Chambers Company, Inc., with the District Director of Internal Revenue for the Austin District of the Internal Revenue Service at Austin, Texas.

[fol. 457] 6. On or about June 5, 1951, Richard A. Farnsworth, Sr. approved an invoice labeled "Requisition No. 12" showing Al Bubeck to be payee.

7. On or about December 31, 1951, Richard A. Farnsworth, Sr. in Houston, Texas, approved Voucher No. 47071 payable to Acme Airco No. 1 for one Amana freezer.

8. On or about January 24, 1953 in Houston, Texas, Richard A. Farnsworth, Sr. approved Voucher No. 70860 for work on a residence.

9. On or about May 4, 1954, Richard A. Farnsworth, Sr. at Houston, Texas, approved an invoice supporting Voucher No. 07490.

10. On or about April 28, 1952, Lorn D. Frazier approved an alleged invoice from Sim D. Brown.

11. On or about November 1, 1953, Lorn D. Frazier approved an alleged invoice from Herman Knox Furniture Company.

12. On or about November 25, 1952, Lorn D. Frazier approved an invoice from B. A. Hoffman.

13. On or about November 29, 1950, H. A. Lott approved Invoice No. 31701 from the National Sash & Door Company.

14. On or about May 15, 1951, H. A. Lott approved Invoice No. 10338 from the Coastal Equipment Company, Inc.

[fol. 458] 15. On or about February 25, 1952, H. A. Lott approved an alleged invoice from Sim D. Brown.

16. On or about September 26, 1953, H. A. Lott approved an invoice from G. V. Robles & Sons.

17. On or about March 31, 1954, H. A. Lott approved an alleged invoice from the Alamo Lumber Company.

18. On or about May 7, 1953, Lee Blocker at Houston, Texas, signed his name to the 1952 corporation income tax return as Treasurer of Farnsworth & Chambers Company, Inc.

19. On or about May 10, 1954, Lee Blocker at Houston, Texas, signed his name to the 1953 corporation income tax return as Treasurer of Farnsworth & Chambers Company, Inc.

20. On or about March 8, 1955, Lee Blocker at Houston, Texas, signed his name to the 1954 corporation income tax return as Treasurer of Farnsworth & Chambers Company, Inc.

21. On or about November 1, 1950, Lee Blocker approved Invoice No. 3664 alleged to be from the Coastal Equipment Company, Inc.

22. On or about December 31, 1951, Lee Blocker prepared Journal Voucher 654.

23. On or about June 2, 1951, Alan Farnsworth approved an invoice from the Hollywood Overhead Door Company.

[fol. 459] 24. On or about February 25, 1951, Alan Farnsworth approved a weekly field payroll charged to the Reagan School job.

25. On or about May 19, 1953, Alan Farnsworth approved an invoice from the Houston Iron & Steel Company.

26. On or about January 2, 1954, Alan Farnsworth approved an invoice from the Barber, Inc.

That the acts aforesaid were and are in violation of Section 371, Title 18, United States Code.

Mr. Blocker, how do you plead to Count Five of the indictment?

Defendant Blocker: Nolo contendere.

Defendant Frazier: Nolo contendere.

The Court: Each of you defendants has heretofore been furnished a copy of the indictment, and you have gone over it with your counsel, and do you think you understand it?

Defendant Blocker: Yes.

Defendant Frazier: Yes, sir.

[fol. 460] The Court: You understand that it is a serious series of offenses with which you are charged?

Defendant Blocker: Yes.

Defendant Frazier: Yes, sir.

The Court: You enter this plea freely, voluntarily, willingly and on your own responsibility, not that of your lawyers?

Of course, they advise you, but in the last analysis it is entirely up to you gentlemen and no one else.

Defendant Blocker: Yes, sir.

Defendant Frazier: Yes, sir.

The Court: You feel that such plea should have been made or you wouldn't have made it, is that right in each instance?

Defendant Blocker: Yes, sir.

Defendant Frazier: Yes.

[fol. 461] The Court: The word "wilfull" appears throughout the indictment, and that means—I am sure your counsel told you—under the Murdock case "with bad purpose or without ground for believing that one's act is lawful or with careless disregard by the one that has the right to so act." You understand that is the law with reference to the word wilfull, do you not?

Defendant Blocker: Yes, sir.

Defendant Frazier: Yes, sir.

The Court: And lastly, each of you defendants, neither of you defendants have ever been adjudged a person of unsound mind or have ever received a severe head injury or has ever been treated for a nervous or mental disease, is that correct?

Defendant Blocker: Yes, sir, that's correct.

Defendant Frazier: Yes.

The Court: All right. As I stated before, the word voluntarily means without any inducement, such as a promise of leniency direct or indirect, express or implied by anyone connected with the Government or anyone else, whether or not any force was used or threats to cause such a plea to [fol. 462] be made. Is that correct, is it a voluntary plea?

Defendant Blocker: Yes, sir.

Defendant Frazier: Yes, sir.

The Court: I will accept the plea of nolo contendere as to each of these two defendants as to each of the counts in the indictment, and continue the bond as is.

Mr. Barry, if you will arrange with them to make the pre-sentence and when you conclude the pre-sentence, I want it sealed and kept in your custody. No one else will see it until I call for it at the conclusion of the lawsuit. You are not to show it to anyone else, judges, district attorneys, co-workers or anyone.

Mr. Hartman: Your Honor, since the plea has been entered and accepted by the Court, it may be necessary that these people testify in this case.

The Court: That is entirely up to them.

Mr. Hartman: I would like permission to interview these defendants.

The Court: That is up to them and their lawyers. It is not a part of this transaction in any way, shape or form. [fol. 463] Mr. Moss: May I address the Court?

There is one matter that I respectfully invite the Court's attention to. In the arraignment an order was entered by Judge Ingraham and these defendants were given special permission from the Court to attend to the affairs of the company. We were hoping that order may continue and we will produce them at any time Your Honor says.

The Court: That's right. I may have overlooked one thing here. I am sure they understand it is a serious offense and the possible punishment, the maximum that is possible could be as much as five years on each count or $10,000 fine or both, or any part of either, and should it have gone to trial the cost of the prosecution could have been assessed as against Counts One, Two, Three and Four. The conspiracy count, Count Five, could be as much as

five years or $10,000 or both, or any part of either. There is no minimum.

Defendant Blocker: Yes, Your Honor, I understand you have that complete authority.

Defendant Frazier: Yes, sir.

The Court: That is all.

Mr. Moss: May we be excused?

[fol. 464] The Court: Anything else at this time?

Mr. Hartman: Nothing from the Government, sir.

The Court: Court will stand adjourned under the Rules.

IN UNITED STATES DISTRICT

CLERK'S DOCKET ENTRY ON REARRAIGNMENT—Entered March 17, 1959

Rearraignment: Defts. Lee Blocker and Lorn D. Frazier, Plea of Nolo Contendere as to each defendant on all counts. Accepted by Court. Presentence investigation ordered for sentence at conclusion of entire case. Defts. granted permission to leave Southern District of Texas while under bond. (ABH).

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[fol. 465]

IN UNITED STATES DISTRICT COURT

Proceedings on Rearraignment of Defendant, of H. A. Lott

APPEARANCES

William B. Butler, Esq., United States Attorney, Post Office Building, Houston, Texas. Fred L. Hartman, Esq., Assistant United States Attorney, Post Office Building, Houston, Texas. Newton B. Schwartz, Esq., Assistant United States Attorney, Post Office Building, Houston, Texas For the Government.

Denman Moody, Esq. and William V. Ballew, Jr., Esq., Baker, Botts, Andrews & Shepherd, Esperson Building, Houston, Texas, For Defendant Lott.

Proceedings

Morning Session—March 20, 1959

COLLOQUY BETWEEN COURT AND COUNSEL RE ENTRY OF PLEA OF NOLO CONTENDERE

The Court: Mr. Moody, do you have a matter to bring before the Court this morning?

Mr. Moody: I would like to have Mr. H. A. Lott come forward, please, sir.

[fol. 466] Your Honor, I represent Mr. H. A. Lott in this case. Prior to this time he has entered a plea of not guilty in this suit, and Rule 11 of the Federal Rules of Criminal Procedure state that with the permission of the Court and at the Court's discretion he may enter a plea of nolo contendere in the case. It is a usual and proper plea as I understand it, in a case of this kind, and with your permission Mr. H. A. Lott would like to enter this plea.

The Court: What says the Government?

Mr. Butler: The Government's position is the same here as it was with the other defendants, Mr. Blocker and Mr. Frazier, in this case. The defendants should be required to plead either guilty or stand trial. We will not repeat the arguments made, but we do not believe it is a proper or appropriate plea to be entered in this case.

The Court: Mr. Schwartz, do you want to supplement anything?

Mr. Schwartz: No, Your Honor.

The Court: I see no difference with what little I know out this case, any difference between this and the one I previously ruled upon and I will permit the plea. I will permit it if it is willingly and voluntarily made. Were you going to arraign him, Mr. Schwartz?

[fol. 467] Mr. Schwartz: Yes, sir.

The Court: Arraign him.

Mr. Schwartz: The Grand Jury charges on Count One that in the Houston Division of the Southern District of Texas and within the jurisdiction of this Court, one Richard A. Farnsworth, Sr., Chairman of the Board of Directors of Farnsworth & Company, Inc., Lee Blocker, Treasurer of

Farnsworth & Chambers Company, Inc., H. A. Lott, Vice President of Farnsworth & Chambers Company, Inc., Alan Farnsworth, Purchasing Agent and Employee of Farnsworth & Chambers Company, Inc., and Lorn D. Frazier, Vice President of Farnsworth & Chambers Company, Inc., all hereinafter called defendants and all respectively in the year 1951 were employed by Farnsworth & Chambers Company, Inc., a corporation engaged in the general contracting business in the State of Texas by virtue of a permit issued by the State of Texas, did wilfully and knowingly attempt to evade and defeat a large part of the taxes due and owing by Farnsworth & Chambers Company, Inc. to the United States of America for the calendar year 1951, by falsifying and altering, and causing to be falsified and altered, invoices, books and records, memorandums, and other documents of Farnsworth & Chambers Company, Inc. at Houston, Texas, and approving and causing to be approved false invoices and documents at Houston, Texas, and concealing and causing to be concealed assets of Farnsworth & Chambers Company, Inc. at Houston, Texas, and diverting and causing to be diverted net income of Farnsworth & Cham- [fol. 468] bers Company, Inc. at Houston, Texas, and concealing and causing to be concealed income of Farnsworth & Chambers Company, Inc. at Houston, Texas, and preparing and causing to be prepared, and mailing and causing to be mailed at Houston, Texas, a false and fraudulent corporate income tax return on behalf of Farnsworth & Chambers Company, Inc. at Houston, Texas, for the calendar year of 1951, which was filed on or about April 16, 1952 with the Collector of Internal Revenue for the First Internal Revenue District at Austin, Texas, wherein it was stated that the net income of the said corporation for the said calendar year of 1951 was the sum of $399,135.98, and that the total amount of tax due thereon was the sum of $194,482.66, whereas, as they then and there well knew the net income of the corporation for the said calendar year of 1951 was the sum of $763,599.62 upon which said net income the corporation owed to the United States of America a total tax of $482,278.96, in violation of Section 145(b) of the Internal Revenue Code of 1939: 26 U.S.C. 145(b).

How do you plead to Count One, guilty or not guilty?

Defendant Lott: I plead nolo contendere.

Mr. Schwartz: Count Two: That in the Houston Division of the Southern District of Texas and within the jurisdiction of this Court, one Richard A. Farnsworth, Sr., Chairman of the Board of Directors of Farnsworth & Chambers Company, Inc., Lee Blocker, Treasurer of Farnsworth & Chambers Company, Inc., H. A. Lott, Vice President of Farnsworth & Chambers Company, Inc., Alan Farnsworth, [fol. 469] Purchasing Agent and Employee of Farnsworth & Chambers Company, Inc., all hereinafter called defendants and all respectively in the year 1952 were employed by Farnsworth & Chambers Company, Inc., a corporation engaged in the general contracting business in the State of Texas by virtue of a permit issued by the State of Texas, did wilfully and knowingly attempt to evade and defeat a large part of the taxes due and owing by Farnsworth & Chambers Company, Inc. to the United States of America for the calendar year 1952, by falsifying and altering, and causing to be falsified and altered, invoices, books and records, memorandums, and other documents of Farnsworth & Chambers Company, Inc. at Houston, Texas, and approving and causing to be approved false invoices and documents at Houston, Texas, and concealing and causing to be concealed assets of Farnsworth & Chambers Company, Inc. at Houston, Texas, and diverting and causing to be diverted net income of Farnsworth & Chambers Company, Inc. at Houston, Texas, and concealing and causing to be concealed income of Farnsworth & Chambers Company, Inc. at Houston, Texas, and preparing and causing to be prepared, and mailing and causing to be mailed at Houston, Texas, a false and fraudulent corporate income tax return on behalf of Farnsworth & Chambers Company, Inc. at Houston, Texas for the calendar year of 1952, which was filed on or about May 12, 1953 with the District Director of Internal Revenue for the Austin District of the Internal Revenue Service at Austin, Texas, wherein it was stated that the net income of the said corporation for the said calendar year of 1952 was the sum of $410,937.87, and that the total amount of tax due thereon was the sum of $207,135.40, whereas, as they then and there well knew the [fol. 470] net income of the corporation for the said calen-

dar year of 1952 was the sum of $495,528.77, upon which said net income the corporation owed to the United States of America a total tax of $251,122.66, in violation of Section 145(b) of the Internal Revenue Code of 1939: 26 U.S.C. 145(b).

How do you plead as to Count Two?

Defendant Lott: I plead nolo contendere.

Mr. Schwartz: Count Three: That in the Houston Division of the Southern District of Texas and within the jurisdiction of this Court, on Richard A. Farnsworth, Sr., Chairman of the Board of Directors of Farnsworth & Chambers Company, Inc., Lee Blocker, Treasurer of Farnsworth & Chambers Company, Inc., H. A. Lott, Vice President of Farnsworth & Chambers Company, Inc., Alan Farnsworth, Purchasing Agent and Employee of Farnsworth & Chambers Company, Inc., and Lorn D. Frazier, Vice President of Farnsworth & Chambers Company, Inc., all hereinafter called defendants and all respectively in the year 1953 were employed by Farnsworth & Chambers Company, Inc., a corporation engaged in the general cont acting business in the State of Texas by virtue of a permit issued by the State of Texas, did wilfully and knowingly attempt to evade and defeat a large part of the taxes due and owing by Farnsworth & Chambers Company, Inc. to the United States of America for the calendar year 1953, by falsifying and altering, and causing to be falsified and altered, invoices, books and records, memorandums, and other documents of Farnsworth & Chambers Company, Inc. at Hous-
[fol. 471] ton, Texas, and approving and causing to be approved false invoices and documents at Houston, Texas, and concealing and causing to be concealed assets of Farnsworth & Chambers Company, Inc. at Houston, Texas, and diverting and causing to be diverted net income of Farnsworth & Chambers Company, Inc. at Houston, Texas, and concealing and causing to be concealed income of Farnsworth & Chambers Company, Inc. at Houston, Texas, and preparing and causing to be prepared, and mailing and causing to be mailed at Houston, Texas, a false and fraudulent corporate income tax return on behalf of Farnsworth & Chambers Company, Inc. at Houston, Texas for the calendar year of 1953, which was filed on or about May 24, 1954

with the District Director of Internal Revenue for the Austin District of the Internal Revenue Service at Austin, Texas, wherein it was stated that the net income of the said corporation for the said calendar year of 1953 was the sum of $179,628.93, and that the total amount of tax due thereon was the sum of $87,907.04, whereas, as they then and there well knew the net income of the corporation for the said calendar year of 1953 was the sum of $362,929.90, upon which said net income the corporation owed to the United States of America a total tax of $183,223.55, in violation of Section 145(b) of the Internal Revenue Code of 1939: 26 U.S.C. 145(b).

How do you plead to Count Three of the indictment?

Defendant Lott: I plead nolo contendere.

[fol. 472] Mr. Schwartz: Count Four: That in the Houston Division of the Southern District of Texas and within the jurisdiction of this Court, one Richard A. Farnsworth, Sr., Chairman of the Board of Directors of Farnsworth & Chambers Company, Inc., Lee Blocker, Treasurer of Farnsworth & Chambers Company, Inc., H. A. Lott, Vice President of Farnsworth & Chambers Company, Inc., Alan Farnsworth, Purchasing Agent and Employee of Farnsworth & Chambers Company, Inc., and Lorn D. Frazier, Vice President of Farnsworth & Chambers Company, Inc., all hereinafter called defendants and all respectively in the year 1954 were employed by Farnsworth & Chambers Company, Inc., a corporation engaged in the general contracting business in the State of Texas by virtue of a permit issued by the State of Texas, did wilfully and knowingly attempt to evade and defeat a large part of the taxes due and owing by Farnsworth & Chambers Company, Inc. to the United States of America for the calendar year 1954, by falsifying and altering, and causing to be falsified and altered, invoices, books and records, memorandums, and other documents of Farnsworth & Chambers Company, Inc., at Houston, Texas, and approving and causing to be approved false invoices and documents at Houston, Texas, and concealing and causing to be concealed assets of Farnsworth & Chambers Company, Inc. at Houston, Texas, and diverting and causing to be diverted net income of Farnsworth & Chambers Company, Inc. at Houston, Texas, and concealing and

causing to be concealed income of Farnsworth & Chambers Company, Inc. at Houston, Texas, and preparing and causing to be prepared, and mailing and causing to be mailed at Houston, Texas, a false and fraudulent corporate income [fol. 473] tax return on behalf of Farnsworth & Chambers Company, Inc. at Houston, Texas for the calendar year of 1954, which was filed on or about March 14, 1955 with the District Director of Internal Revenue for the Austin District of the Internal Revenue Service at Austin, Texas, wherein it was stated that the net income of the said corporation for the said calendar year of 1954 was the sum of $282,441.03, and that the total amount of tax due thereon was the sum of $135,797.53, whereas, as they then and there well knew the net income of the corporation for the said calendar year of 1954 was the sum of $406,898.80, upon which said net income the corporation owed to the United States of America a total tax of $200,515.57, in violation of Section 7201, of the Internal Revenue Code of 1954: 26 U.S.C. 2017.

How do you plead as to Count Four of the indictment?

Defendant Lott: I plead nolo contendere.

Mr. Schwartz: Count Five: That on or about the 1st day of January of 1950, the exact date to the Grand Jurors unknown and continuously thereafter up unto and including the 14th day of March of 1955, in the Southern District of Texas, Houston Division and within the jurisdiction of this Court and other Judicial Districts of the United States of America, Richard A. Farnsworth, Sr., Lee Blocker, H. A. Lott, Lorn D. Frazier, and Alan Farnsworth, all of Houston, Texas all hereinafter called defendants did unlawfully, knowingly, wilfully and feloniously conspire, combine, confederate and agree together with each other and Dunbar [fol. 474] N. Chambers, deceased, not indicted herein, and divers other persons whose names are to the Grand Jurors unknown to violate Section 145(b) of the Internal Revenue Code of 1939, Section 145(b), Title 26, United States Code and Section 7201 of the Internal Revenue Code of 1954, Section 7201, Title 26, United States Code, to-wit: To wilfully attempt to evade and defeat a large part of the income taxes due and owing to the United States of America by Farnsworth & Chambers Company, Inc. for the calendar

years of 1951, 1952, 1953 and 1954 under circumstances and by the means and other manner following:

That at all times material herein:

1. Farnsworth & Chambers Company, Inc., a corporation engaged in the business of general contracting work in the State of Texas, as permitted by the State of Texas, with its principal office in Texas situated at Houston, Texas;

2. Richard A. Farnsworth, Sr. was Chairman of the Board of Directors of Farnsworth & Chambers Company, Inc.;

3. Lee Blocker was Treasurer of Farnsworth & Chambers Company, Inc.;

4. H. A. Lott was Vice President of Farnsworth & Chambers Company, Inc.;

5. Lorn D. Frazier was Vice President of Farnsworth & Chambers Company, Inc., and

6. Alan Farnsworth was Purchasing Agent and Employee of Farnsworth & Chambers Company, Inc.

[fol. 475] A. It was part of said conspiracy to falsify and alter books and records, memorandums, bills and receipts and documents of Farnsworth & Chambers Company, Inc.

B. It was further a part of the conspiracy to approve falsified invoices, bills, memorandums and documents for payment by Farnsworth & Chambers Company, Inc.

C. It was further a part of the conspiracy that defendants would conceal purchases of assets of Farnsworth & Chambers Company, Inc. by representing that payments for such assets were for rentals, repair expenses, parts expenses and materials used in construction work by Farnsworth & Chambers Company, Inc.

D. It was further a part of the conspiracy to alter and delete the true records of the corporation for the purpose of concealing the true net income of the corporation.

That the Grand Jurors further charge that at the times and at the places herein named, in furtherance of the object,

design and purpose of such conspiracy, the defendants hereinafter named did do and perform the following overt acts:

1. Each of the overt acts alleged in the preceding four counts of this indictment, in the respective dates and places alleged therein.

2. That on or about April 16, 1952, Richard A. Farnsworth, Sr., Lee Blocker, H. A. Lott, Alan Farnsworth, and [fol. 476] Lorn D. Frazier filed and caused to be filed a corporate income tax return on behalf of Farnsworth & Chambers Company, Inc., with the collector of Internal Revenue for the First Internal Revenue District at Austin, Texas.

3. That on or about May 12, 1953, Richard A. Farnsworth, Sr., Lee Blocker, H. A. Lott, Alan Farnsworth and Lorn D. Frazier filed and caused to be filed a corporate income tax return on behalf of Farnsworth & Chambers Company, Inc. with the District Director of Internal Revenue for the Austin District of the Internal Revenue Service at Austin, Texas.

4. That on or about May 24, 1954, Richard A. Farnsworth, Sr., Lee Blocker, H. A. Lott, Alan Farnsworth and Lorn D. Frazier filed and caused to be filed a corporate income tax return on behalf of Farnsworth & Chambers Company, Inc. with the District Director of Internal Revenue for the Austin District of the Internal Revenue Service at Austin, Texas.

5. That on or about March 14, 1955, Richard A. Farnsworth, Sr., Lee Blocker, H. A. Lott, Alan Farnsworth and Lorn D. Frazier filed and caused to be filed a corporate income tax return on behalf of Farnsworth & Chambers Company, Inc., with the District Director of Internal Revenue for the Austin District of the Internal Revenue Service at Austin, Texas.

6. On or about June 5, 1951, Richard A. Farnsworth, Sr. approved an invoice labeled "Requisition No. 12" showing Al Bubeck to be payee.

[fol. 477] 7. On or about December 31, 1951, Richard A. Farnsworth, Sr. at Houston, Texas, approved Voucher No. 47071 payable to Acme Airco No. 1 for one Amana freezer.

8. On or about January 24, 1953 in Houston, Texas, Richard A. Farnsworth, Sr. approved Voucher No. 70860 for work on a residence.

9. On or about May 4, 1954, Richard A. Farnsworth, Sr. at Houston, Texas, approved an invoice supporting Voucher No. 07490.

10. On or about April 28, 1952, Lorn D. Frazier approved an alleged invoice from Sim D. Brown.

11. On or about November 1, 1953, Lorn D. Frazier approved an alleged invoice from Herman Knox Furniture Company.

12. On or about November 25, 1952, Lorn D. Frazier approved an invoice from B. A. Hoffman.

13. On or about November 29, 1950, H. A. Lott approved Invoice No. 31701 from the National Sash & Door Company.

14. On or about May 15, 1951, H. A. Lott approved Invoice No. 10338 from the Coastal Equipment Company, Inc.

15. On or about February 25, 1952, H. A. Lott approved an alleged invoice from Sim D. Brown.

[fol. 478] 16. On or about September 26, 1953, H. A. Lott approved an invoice from G. V. Robles & Sons.

17. On or about March 31, 1954, H. A. Lott approved an alleged invoice from the Alamo Lumber Company.

18. On or about May 7, 1953, Lee Blocker at Houston, Texas, signed his name to the 1952 corporation income tax return as Treasurer of Farnsworth & Chambers Company, Inc.

19. On or about May 10, 1954, Lee Blocker at Houston, Texas, signed his name to the 1953 corporation income tax return as Treasurer of Farnsworth & Chambers Company, Inc.

20. On or about March 8, 1955, Lee Blocker at Houston, Texas, signed his name to the 1954 corporation income tax return as Treasurer of Farnsworth & Chambers Company, Inc.

21. On or about November 1, 1950, Lee Blocker approved Invoice No. 3664 alleged to be from the Coastal Equipment Company, Inc.

22. On or about December 31, 1951, Lee Blocker prepared Journal Voucher 654.

23. On or about June 2, 1951, Alan Farnsworth approved an invoice from the Hollywood Overhead Door Company.

[fol. 479] 24. On or about February 25, 1951, Alan Farnsworth approved a weekly field payroll charged to the Reagan School job.

25. On or about May 19, 1953, Alan Farnsworth approved an invoice from the Houston Iron & Steel Company.

26. On or about January 2, 1954, Alan Farnsworth approved an invoice from the Barber, Inc.

That the acts aforesaid were and are in violation of Section 371, Title 18, United States Code.

How do you plead as to Count Five of the indictment?

Defendant Lott: I plead nolo contendere.

The Court: Mr. Lott, you have heretofore been furnished a copy of the indictment in the case. You have gone over it, read it and discussed it with your privately employed attorneys, Mr. Moody and Mr. Bailey who are with you at this time?

Defendant Lott: Yes, sir.

The Court: You understand it is a serious case?

Defendant Lott: I do, sir.

[fol. 480] The Court: And that the possible penalty for the first four counts could be as much as five years imprisonment and $10,000 fine or both, or any part of either. There is no minimum. It could be that together with the cost of prosecution in the case.

Defendant Lott: I do, sir.

The Court: Although you have counsel and they are with you here in Court at this time, and in the final analysis it has to be your responsibility and no one else, and that is your decision?

Defendant Lott: Yes, sir.

The Court: And your responsibility?

Defendant Lott: Yes, sir.

The Court: And you enter this plea of nolo contendere voluntarily, that is willingly and freely and understanding the nature of the charge?

Defendant Lott: I do, sir.

[fol. 481] The Court: And you do so without any promise of leniency directly or indirectly, express or implied by the Government or anyone else, and no force or anything of that description has been used to you?

Defendant Lott: That is correct.

The Court: And you do so because you feel it should be made and for no other reason?

Defendant Lott: Yes, sir.

The Court: And the word "wilfull" appears in the indictment and I believe it is in each count. That means with bad purpose or without ground for believing that one's act is lawful or with careless disregard by the one that has the right to so act.

Do you understand that that is the definition?

Defendant Lott: I do, sir.

The Court: And lastly, have you ever been adjudged a person of unsound mind or have you ever received a severe head injury or have you ever been treated for a mental or nervous disease?

Defendant Lott: I have not, sir.

[fol. 482] The Court: On the first four counts, the substantive counts, I have told you the possible penalty on those counts. The fifth count is the same, it could be as much as five years or $10,000 or both. It doesn't have the provision of the possible cost of prosecution in it. Do you understand that?

Defendant Lott: Yes, sir, I do.

The Court: I will accept the plea of nolo contendere.

Have the probation office, Mr. Barry, make the investigation and after you have completed it put all copies of it,

seal it and keep it there until time for the sentence, whenever that will be. Bring it to me with the seal unbroken.

Continue the bond.

Mr. Schwartz: Yes, Your Honor.

Mr. Moody: The Court has heretofore entered an order that Mr. Lott could travel out of the district.

The Court: That continues, of course. There is no deviation from that at all.

I believe that is all at this time?

Mr. Butler: Nothing from the Government, Your Honor.

[fol. 483] The Court: Court will stand adjourned under the Rules.

IN UNITED STATES DISTRICT COURT

CLERK'S DOCKET ENTRY ON REARRAIGNMENT—Entered March 29, 1959

Rearraignment: Deft. H. A. Lott.

Plea of Nolo Contendere on all counts.

Presentence investigation ordered for sentence at conclusion of entire case.

Deft. allowed to leave Southern District of Texas while under bond. (ABH).

[fol. 487]

IN UNITED STATES DISTRICT COURT

Sentencing of Defendants Lee Blocker, H. A. Lott and Lorn D. Frazier

* * * * * * *

APPEARANCES:

Fred L. Hartman, Esq., Assistant United States Attorney, Post Office Building, Houston, Texas,

Newton B. Schwartz, Esq., Assistant United States Attorney, Post Office Building, Houston, Texas, For the Government.

John H. Crooker, Sr., Esq., Fulbright, Crooker, Freeman, Bates & Jaworski, Bank of the Southwest Building, Houston, Texas,

Joe S. Moss, Esq., Esperson Building, Houston, Texas.
For the Defendants Lee Blocker and Lorn D. Frazier.
[fol. 488] Denman Moody, Esq. and William V. Ballew, Jr., Esq., Baker, Botts, Andrews & Shepherd, Esperson Building, Houston, Texas, For Defendant H. A. Lott.

Proceedings

Morning Session—June 19, 1959

Colloquy Between Court and Counsel

The Court: On the criminal action docket for sentence, Cause No. 13,298, United States of America versus Lee Blocker, Lorn D. Frazier, and H. A. Lott.

If the letter that counsel for Lee Blocker and Lorn D. Frazier was intended as a motion, it is overruled. Let the record so disclose. I believe all of the defendants are present, will they come forward.

Does the Government have anything to say to the Court at this time before I call on the defendants to tell me whatever they want to say or their lawyers or friends want to tell me in their behalf?

Mr. Schwartz: Your Honor, I believe the Court has heard the facts tried following these gentlemen's pleas.

If it please the Court, at the conclusion of the defendant's statements if there are any matters which are called upon for an answer, we would respectfully request permission to answer them then, but we think there is no other statement called for in the case.

[fol. 489] The Court: I will not say that I will at this time.

I will call the first on the docket, Mr. Blocker first, and then Mr. Lott and Mr. Frazier.

Mr. Blocker, do you have a statement to make or do you have counsel or friends who would like to say anything on your behalf before I pass sentence upon you?

All three of you have entered a plea of nolo contendere, and that is equivalent to a plea of guilty.

Mr. Crooker: I would suggest that we would like to introduce some character witnesses, and I think I can speak for two of the defendants and Mr. Lott's counsel will speak for him, and I think there may be a brief statement by one or both of our clients.

I would like to introduce the character witnesses first, if I might, and I assume that Mr. Lott's counsel will do likewise.

The Court: Apparently there is a number of them, and I will let them take the stand and let them be sworn one by one.

The Clerk: What are your ages?

Defendant Blocker: Forty-one.

Defendant Frazier: Forty-six.

[fol. 490] Defendant Lott: Fifty.

Mr. Crooker: Do you have, Your Honor, in mind any particular sequence? I want to keep the character witnesses with respect to each of them together.

The Court: It doesn't matter. The way they fall on the indictment is the way we will take them up. I believe it is Mr. Blocker and then Mr. Frazier and then Mr. Lott.

(All witnesses for Defendant Blocker are sworn.)

* * * * * * *

[fol. 520] Mr. Crooker: That is all of the testimony that we are going to offer. At the conclusion or at any time that Your Honor may want it, I do not think Mr. Frazier—you may want to ask him, but I think he has indicated that he has nothing to say unless Your Honor might want to ask him something.

Mr. Blocker would like to make a very brief statement and can make it standing here and not in answer to questions. You may have him sworn if you want, but it will be a very brief statement.

The Court: Suppose we have it now.

Mr. Crooker: Mr. Blocker, will you step forward.

The Court: If he does not care to be sworn it is not necessary. You may make whatever statement you would like to make.

Mr. Crooker: You understand the reason you are here and the Judge's duty to perform and you can make your statement in your own way.

Mr. Blocker: Your Honor, I have had an opportunity to think about what I am going to say for a long time, and it is kind of hard to wrap it all up in a few words, but I am going to try and do that.

In considering my case, I hope that it will be borne in mind that at the time I went to work with the Farnsworth [fol. 521] Company I was about twenty-six years of age, and I had had very little actual practical experience in business affairs up to that time. I had been married a short while, and after I had been with the company about a year we had our first child.

Then, when I was thirty-one Mr. Chambers and Mr. Farnsworth organized the new company, Farnsworth & Chambers Company, and practically all of my real experience in business had been with them.

At the time the new company was organized, my real problem was financial, mainly, and at that time I put my entire life savings, about eleven and a half thousand dollars plus ten thousand dollars that I was able to borrow in a local bank, in the company. My age is no justification for any mistakes I made in the past, and I recognize that, but I do think it is good, I do want to point out that I didn't have a broad background of years of experience before going to work with the company.

I have made some mistakes in these matters, and as I say for some time now I have recognized that fully, and I want to make that very clear to Your Honor that I do recognize it. Looking back over what went on, I am sorry that when things were presented in an improper manner that I didn't just leave the services of the company and find employment elsewhere, but hindsight is—it is just a matter of hindsight, and it is hard to lean on that at this time.

I will say this, today, and as far as anything in the future is concerned, I would definitely leave the services of a company before I would ever do anything, if called upon, in an improper manner.

I am not attempting at this time in any way to whitewash what I have done in the past. For quite a long time now I have been tortured more, much more, than could possibly [fol. 522] be done by what would be done in a Court. I own up to any improprieties that may have been permitted to exist.

The Court: Is there any doubt in your mind about that, you used the word "might"?

Mr. Blocker: There is no doubt at all, Your Honor. I didn't intend to use that word.

There are improprieties that exist.

There is one other thing that occurs to me that you might wonder about, why if I had objection to accounting irregularities, as I pointed out, why would I have let some amount of work be done by the company out at my house in 1951, which I did at that time.

I considered that in the nature of a bonus. It was a time when I needed some help, and the company has always been very considerate of its key personnel in trying to help them when they needed a helping hand, and the company had done that for other employees. I certainly realize that, looking back on it, again hindsight would clearly show that it was improperly handled but at the time I considered it more in the nature of a bonus, and something that I believe, really, it was wrong more as a matter of form. Had it been handled as a bonus rather than as it was done, I believe it would be without criticism.

Throughout the period that the Internal Revenue Service has carried on their investigation, I have tried in every way to cooperate with them in what they have tried to accomplish in our organization, and it is in that same spirit that I [fol. 523] am making these few remarks here today.

As I say, I have thought a lot about what I wanted to say, and I believe I have covered the important points.

I would like to say though that I filed a plea of nolo contendere with the effect of throwing myself on the mercy of the Court, and what I have said here today is to reaffirm that, and I have not regretted what I have done.

The Court: You mean the irregularity part or the nolo plea?

Mr. Blocker: That I have not regretted filing the nolo plea, Your Honor.

Mr. Crooker: We have no further testimony, Your Honor, and nothing further to add with respect to these two defendants whom we represent.

The Court: Does Mr. Frazier care to say anything in his own behalf?

Mr. Moody: Your Honor, since Mr. Crooker has gone forward with his testimony into other matters, it would suit me just as well if it satisfies your procedure for him to complete his presentation and then we could take up Mr. Lott in his order.

[fol. 524] The Court; Mr. Crooker, or Mr. Moss if they cared to say a few words, and as many as they want, you may do so now.

Mr. Crooker: Thank you, Your Honor. I had not expected to be called upon.

The Court: You were not called upon.

Mr. Crooker: I wanted to say something, but I hadn't expected the occasion to arise so quickly. What I wanted to say, Your Honor, is two or three things about the matter.

I wanted to remark to Your Honor what you doubtless know without my suggesting it to you or reminding you of it, that any man who enters a plea of nolo contendere, there are wonderful advantages to it. If I were doing it today I would do just exactly that, I would advise these clients of ours to do precisely what they did, and knowing that I am going to say about it is intended to not take anything from exactly what they did here in open Court. They are standing by it and so am I.

I make that remark, although don't think it is necessary to do it, but when a trial goes on in the absence of any man, even though it was set up that way himself, and with his lawyer, too, but it goes on and we do not know what was brought out—

[fol. 525] The Court: Right on that point, counsel, didn't you have this young man present every day and every hour taking down notes?

Mr. Crooker: Yes, I have everything, a daily report and everything that I had. That is not what I was going to suggest. I know what exactly was testified, in substance. He is not a shorthand reporter. We didn't buy a copy of it. We did buy one witness, I think, but we have a daily report.

Here is what I am going to say, without the opportunity to cross examine witnesses or bring out this or the other thing, a man might get a slightly different opinion about the case, especially where two contending forces seem to me, seemed to me during the trial to have, I am not critical of them, God bless them, that was their business, they were representing their respective clients, but one seemed to me to be emphasizing a good deal about one of my clients, and that other—

The Court: That would be Mr. Blocker?

Mr. Crooker: Yes, it would. The others seemed to do likewise. I am not complaining about that, I am not critical about that.

Your Honor is kind enough, I think you would give us days if we asked for it and wanted it. All I am doing is contenting myself with the statement that it does leave and did leave with Your Honor as you went along impressions [fol. 526] that were almost inescapable. I should say all but inescapable.

What I am saying is, that factually, and I think the record shows this, certainly through the testimony of Government witnesses, Mr. Reeves and Mr. Adams, that in 1951 their testimony shows and I have the substance of it, Your Honor, as you pointed out, and everyone here knows it, but the company set up a separate cost department that was not under the jurisdiction of Lee Blocker.

Now, nobody testified as to why that was done. Dunbar Chambers was dead. Mr. Farnsworth certainly wasn't. Had I been representing him or Your Honor or any other lawyer representing him, he wouldn't have gone out of his way to say why they set that up.

Anyway, Lee Blocker had no control in 1951. Mr. Reeves and Mr. Adams did say it related essentially to keeping cost records of the various jobs, and from that time on there were not as many opportunities or occasions for Lee Blocker to know about everything. That is not excusing what he did know, but about everything, the nature and extent of all of the irregularities, that is what I am pointing out.

I think that is shown clearly by the testimony of Reeves and Adams, two witnesses for the Government, whom so far as I know were worthy of credence.

The Court: You do not think possibly they could have been accomplice testimony?

Mr. Crooker: I think they were telling the truth and were in a position to know it. That is one thing about the testi- [fol. 527] mony of an accomplice, there is no one that knows the facts any better. You can look upon it with suspicion, but if you find the physical facts support it, but it is the most accurate testimony you can get. In my experience and what Your Honor has observed and experienced throughout his career, I think you will agree.

I think they testified, yes, their testimony I think the testimony of those two witnesses was subject to the accomplice rules and to be corroborated, but there were men on that jury and a good many other people that I know figured that they were telling the truth.

I have no complaint. I am calling attention that it was exculpatory for Mr. Blocker, but its exculpatory character, the extent of the testimony would have shown even more clearly that the occasions for Mr. Blocker's knowledge about or participation in irregularities lessened.

I don't say they stopped. They didn't, but I do think under the Government's testimony that is true.

Now, another factual matter that I wanted to point out, I think the testimony shows it in substance, but I think it is certainly undisputed that of the top key men, the six men, I am talking about after Farnsworth and Chambers, something that might be called a chain of command of the next six men, of the key men in that organization, five of them have more base salary than did Mr. Blocker. I have in mind Earl Calkins, Frank Glass, who testified, I think. I don't know.

The Court: He did.

[fol. 528] Mr. Crooker: And Pat Chambers and Lorn Frazier and Mr. Lott.

Now, I am mentioning those two names. There is no indication, I hope Your Honor will understand, I am not saying that they made more money than Blocker did and therefore anything. I am not drawing any deductions from that and I am not hinting or suggesting that you draw any, but the facts are that those five men were paid more salary than was Lee Blocker. All I am doing is to say that that indicates, for whatever it is worth, and Your Honor is able to appraise it.

The only other thing I have to suggest to Your Honor is that Your Honor is confronted with the duty and obligation and you cannot pass it on to anybody. I do not presume to try to exercise it or to suggest it. That is your job, of course. I know you know it, but I want you to know that I recognize it and realize it. You don't have to be told, and the only reason I mention it is to give you perfect assurance that all I want to do is suggest that compassion and justice are two sides of the same coin.

I don't think there is any justice, stern justice, rigorous, right, justice [illegible]out compassion, and I am certainly sure there can be no proper compassion without justice.

Now, the two have something of an antithesis between them. Where you can exercise mercy and pity and compassion and where are you going to rigorously enforce justice, administer justice. All I am saying to you is that in my humble judgment that whatever I have learned in these three-quarters of a century that I have been here, I can't help it (sic) believe but that there is a justice that is demanded and required that comes from the mind of God. [fol. 529] I think it does. I am just as profoundly convinced, may it please the Court that from the heart of God there comes compassion without which there can be no justice.

Time and again throughout the Bible, time and again through the Bible, the idea of compassion was illustrated by the Master himself when he was on earth. The woman taken in adultery to whom the Lord said, "Go and sin no more"; whose body was cleansed and her spirit straightened out. She was guilty, rigorously under the law, and under the old dispensation an eye for an eye and a tooth for a tooth in the Old Testament, she would have been stoned to death.

The same thing happened with the penitent thief on the cross to whom the Saviour said, "This night shalt thou be with me in Paradise."

St. Peter promised more than he fulfilled, and Our Lord always dealt with him compassionately even in his appearance before the disciples after the resurrection and his ascension and in which you and I believe, Your Honor, and which Christian people believe.

I do not mean to press the point or over emphasize it, but I am suggesting for Your Honors consideration that there can be no real justice without a proper method of compassion, that does not lie on my lips, it is not in my province as to how it should be exercised, especially when I am as close to it as I am.

I have a way of becoming interested in a matter and feeling that I know it. This man Frazier is a clean family man, for whom I have a profound respect. Mr. Blocker I know

better, I have known him longer. I have been in his home and he has been in mine, and his wife is in the audience.

[fol. 530] Incidentally, I am not testifying as a witness, but it is indisputable that his home is a nice, old-style, two-story house. It is not air conditioned, but it has an atmosphere into which I am happy and proud to take my wife on social visits, and I am proud to have them in my home and their three lovely children.

I will leave the matter to Your Honor, and I hope Your Honor does not consider me presumptuous at all when I am suggesting to Your Honor that in the administration of justice there must be a measure of compassion. Just how much, how little, where the balance is, it is up to Your Honor and I trust you will exercise it, and I am sure you will exercise it in whatever manner you determine to be right and proper.

The Court: Mr. Moss?

Mr. Moss: Just one moment, Your Honor.

If Your Honor please, I could not tell the Court any more than what has been said. In my own particular case, I could say that I didn't know the gentlemen till a few months ago. My entry into the matter was due to the untimely death of the lead counsel.

After going into the case, this result today has come about. As a result of my employment and the attendant publicity on it, I can truthfully say as an officer of the Court I have never had a case over twenty-five years as an attorney at the bar that has given me as much concern as has this one. Not so much from the standpoint of legal implication, but the standpoint of appeal from all walks of life that have shown such a great interest in the welfare of these two men.

[fol. 531] I would like to give you one example which I will testify to under oath if the Court desires.

I pulled into a strange filling station in a little town of Montgomery, Texas, northwest of Conroe.

The Court: If Judge Davis were in the audience he would testify to that.

Mr. Moss: The only time I was in the town in my life.

I pulled in the filling station and there was a stranger just getting some service and a truck pulled in and the

truck driver picked up the Sunday newspaper and made the statement without any prompting, "I just can't believe that Mr. Frazier would steal anything."

Thank you, Your Honor.

The Court: We will take a short recess and then we will start on the next phase of the case.

(Recess taken.)

The Court: You may continue, gentlemen.

Mr. Moody: Your Honor, Mr. Lott would like to address the Court.

Mr. Lott: Judge, I realize that I have made a great mistake and that I should have had the courage to have gotten out in 1953 when some of the younger fellows did. [fol. 532] The Court: That could be the first statement of remorse or repentance that I have heard during these last eleven weeks. Maybe I did hear, but I don't remember.

Go ahead.

Mr. Lott: I had worked for Farnsworth & Chambers Company and Farnsworth originally all of my life, and frankly, I didn't know anything else.

I realize that I made a great mistake and I shall never recover from it, and I shall never make a mistake again.

The Court: Call your witnesses.

Mr. Moody: Mr. Ballew and I both represent Mr. Lott and each of us would like to make a statement to the Court.

Your Honor, Mr. Lott plead nolo contendere in this case, and it must be obvious, of course, to the Court that no evidence of any kind was presented in his behalf. In other words, we forewent the opportunity to bring out such things that might be favorable to him in mitigation only, that is what I address myself to.

We did not have that opportunity and we voluntarily abandoned it when we plead nolo.

What I say, Your Honor, will have nothing to do with the defense of Mr. Lott. The plea of nolo has foreclosed that, I understand. I would like to mention to the Court a few facts which I feel are mitigating circumstances, which I think this Court would wish to hear before reaching a [fol. 533] final decision with respect to Mr. Lott.

I will be brief as possible, and I will not go over a rehash of the evidence that the Court sat through for nine weeks and heard. Certainly our pleading nolo did not contribute to the length of the trial, and we had hoped this thing would be over sooner, but it was not.

Your Honor, I feel that in a criminal case the type of character of a defendant's intent is of the greatest importance. That is the intent, which is the criminal intent.

If we determine the setting in which a respective defendant moves, if we determine that defendant's relative importance in the event of things, and if we determine who thought up things that were done and who was merely a follow-up, I think that we begin to get into the real guts, so to speak, of liability and criminality.

Alvin Lott's father died when Alvin was eight years old. He was born in Louisiana and he finished high school and was without resources. He went to work, as young men do who are not able to continue in school. He worked from 1927 to 1949 for R. P. Farnsworth Company. As he said here a moment ago, he just didn't know anything else. That was his life's work before these people, Farnsworth & Chambers came about in 1949, in this new company which was formed, Farnsworth & Chambers, Inc. He was given an opportunity, I suppose, as a long-time employee, to obtain three per cent of the stock of the company. I believe it was about three per cent.

Now, he never did own more than about that much in the company. That was his interest in Farnsworth & Chambers. The difference now with the new company was that he was [fol. 534] in charge of eight or ten jobs all over the southern states of the United States. He had no acquaintance with the accounting. His education did not qualify him as an accountant. He had no training in the way of corporate management.

He didn't have those things, not having been to school. In charge of all these jobs, Your Honor, this man was out of the office about three fourths of his time traveling among these states, doing the construction work.

Now, he is an outside man. He was not an office man. These are things that I do not believe were emphasized at

the trial, because there was no reason to emphasize them, and he was not here having plead nolo.

Your Honor, this was a one-man corporation, the will and direction of one man, Mr. Dunbar Chambers, permeated completely every policy and every decision that this company came to. In fact, Your Honor, I think it was pretty well illustrated at the trial that no one in the company, no matter the title, was hardly even allowed to think for himself. The policy and directions came from above.

Yes, Your Honor, others had titles. Mr. Lott was a vice president, but these titles in this company, as I have seen it, did not carry with it the authority that you would think such titles would have. It is hard to believe that a one-man company was run that way, but it was, and I believe that if any point was established during the trial or during my talks with any of these witnesses, that is the thing.

Now, Your Honor, on August 8 of 1957 Mr. Lott voluntarily agreed to give Mr. Gromatzky a full and complete statement. It is rather interesting the way that came up. [fol. 535] Mr. Lott phoned Mr. Ballew one day and said Mr. Gromatzky wanted to see him and take some statements. Mr. Ballew asked what it was about.

Mr. Lott told him "It was about Farnsworth & Chambers."

"Well, what does he want to know?"

Mr. Lott said he didn't care what he wanted to know, he was willing to tell the Government whatever it wanted to know.

Mr. Ballew said, "Hadn't we better get some time, you may want to refresh your memory about this and that?" and disregarding Mr. Ballew's advice, Mr. Lott nevertheless went straight ahead and without consultation of any kind or refreshing his memory, he cooperated fully with Mr. Gromatzky, which I think was a very fine thing for him to do.

Now, Mr Gromatzky took a full statement from Mr. Lott and he was kind enough to furnish us with a copy of that statement. This statement was taken long before Mr. Lott was charged with anything. He was under no charge as far as I knew. I don't suppose he knew that he was under suspicion. I don't know that.

Now, are they in mitigation, these circumstances? I say they are, and that's all I have in mind.

In that statement, Mr. Gromatzky paid, I think, a nice compliment to Mr. Lott on page 14 where he states to Mr. Lott: "I might as well pass on a compliment I heard on you the other day, that someone told me you had done a real good job on setting up the Air Force, or I guess it is the Army Air Force Academy up in Colorado."

Your Honor, this man was in charge of some very responsible jobs, and apparently he did them well.

[fol. 536] To reveal Mr. Lott's relative position in the company, regardless of title, I think title in this company meant practically nothing, I think it was given as maybe sometimes someone might give a title instead of a raise to a person, but these people had titles spread around pretty well, but when it came to authority there wasn't much there.

On page 42 of Mr. Gromatzky's transcript is this statement and answer which I think is rather revealing. Mr. Gromatzky says, "Let me ask you some more questions. It has been reported to me that you and these other corporate executives were so concerned about the costs that were being charged into the corporation that should have been charged to Mr. Chambers on his residence that you as a group and in a body went to see Mr. Chambers on several occasions and asked him to discontinue this practice. Is that true or is it false?"

Mr. Lott says, "I don't recall such a meeting with him discussing in that particular way, I would say that I have had some discussions with Mr. Chambers in effect about some of the practices and policies of the company which I could not correct."

Those statements were made, Your Honor, back in the middle of '57 before Mr. Lott thought he was defending himself in any type of a charge or criminal action, and when he went voluntarily down there to give this, as he knew it, on page 46, Your Honor, and this is another statement:

Mr. Gromatzky was asking him about the corporation and its management, and Mr. Lott made this statement: "I think that you know, and that most of them know that was pretty well a one-man organization, even though we did have titles as maybe vice president and directors and so forth, that most of our work in connection with this [fol. 537] sort of thing was not of our own making."

That was before Mr. Lott knew that he was going to be faced with any type of a charge.

Hortense Dyer, Your Honor, was a witness at the trial. Of course, we did not cross-examine her, we did not bring out anything that might have been a mitigating factor in Mr. Lott's behalf. However, had she been asked, she would have testified, "That Mr. Lott was a sort of servant that Mr. Chambers kept for years, that Mr. Lott was not even consulted when anything was being planned." She would further have testified that Mr. Dunbar Chambers told her and she was the secretary of Mr. Dunbar Chambers, "Lott is just a little man who doesn't understand big business."

On another occasion, Mr. Dunbar Chambers told her Lott is a good contractor, but he doesn't understand business.

The Court: Isn't that same little man the head of his own engineering company now?

Mr. Moody: That's right. He has gone out and started his own company in 1957. That is the man.

I think that gives you an insight into the authority that Mr. Lott had, and his role in this train of events.

He did leave, Your Honor, and he formed his own company, and he has been attempting to get along in it and to manage it and he has run that company, Your Honor, as far as I can determine, honorably and well since the time that he began it.

[fol. 538] There is another matter that I wish to mention, and I think it is very worthy of note, and that is that Mr. Lott in his new company and since 1957 has performed at least a half dozen different jobs for the Atomic Energy Commission at Los Alamos, New Mexico. Now, these are restricted jobs, Your Honor, and while I am not too well acquainted with the type of investigation and the goings on that you have to go through to get a job of that type, I can pretty well imagine that the United States Government is not going to give a restricted job of that type to a man who has not been first thoroughly investigated and found to be completely trustworthy.

One more word, Your Honor, and I will be through. I have had a good deal to do with Mr. Lott during the last year or so, since this has come up. I like him. I think he is a trustworthy man. I would trust him all the way with

what I had. I think he is an honorable man. He is the kind of fellow that I like to know, and he is the kind of man that I hope I will keep as my friend in the future.

The Court: Mr. Ballew?

Mr. Ballew: Thank you, Your Honor.

I will make these remarks brief. They will be personal in a way, but they, too, are directed towards mitigating circumstances, and also it will be a request for leniency.

My contact with Farnsworth & Chambers, sir, goes back to early 1953 when my college friends, Frank Glass and Louis Spaw, resigned from Farnsworth & Chambers for reasons in part that you know about, and came down to [fol. 539] our office and asked us to help them to organize a new construction company in Houston and to help them negotiate the repurchase of their stock from Mr. Chambers. That was early in '53 that I first became acquainted with the company and the personnel.

I think that is largely why Mr. Lott came to our firm in April of 1957 when he was discharged from Farnsworth & Chambers. He came down because Louis Spaw and Frank Glass had been through that before, and they said to go down to our firm and they would help. He came down in April of 1957 and asked that we assist him start a new construction company called H. A. Lott, and he asked that we help him negotiate the resale of his stock to the company.

Under the stock repurchase agreement, at that time there wasn't the slightest hint that he was involved in this criminal lawsuit and no intimation of it at the time. I would say this, since we undertook that representation in April, what Mr. Moody has said in his closing remarks, we have found him a decent citizen and an honest upright kind of man. That has been true of his life as we have learned it prior to his association with Farnsworth & Chambers and since then.

This man has made some great mistakes while at the company. He has not tried to deny them. He feels that it has been a bitter shame on his family.

I have every confidence that this man has learned a rather bitter lesson.

Let me say by way of mitigation, when we got into this criminal aspect of his life, it was in August of 1957 and we did not see this dark cloud coming at any time until the day before. He insisted upon talking to Mr. Gromatzky. At that time I think I was the one lawyer in the firm most [fol. 540] closely associated with Mr. Lott, and it was I that went to Dallas to see the Internal Revenue Service on his behalf and later went to Washington, D. C.

By way of mitigation, Your Honor, I think it would be significant in order to place this man in the total picture to point out some of the things that were said during those experiences.

I think that I am not misquoting the special investigator who did such a thorough job of this company, that he could have recommended prosecution against scores of employees of this company, but he felt that he had to draw the line at the level of responsibility, and he felt that Mr. Lott should be included.

However, he went on to add that in his opinion Mr. Lott was next to last in responsibility.

When I got to Washington and talked to the Justice Department lawyer about this case—

The Court: You mean next to the last of the six that were indicted?

Mr. Ballew: Yes, sir.

When I got to Washington, the lawyer in the Justice Department admitted that Mr. Lott wasn't living out of that corporation, and then I think it is of some significance that during the protracted trial of this case and in the closing moments, Mr. Schwartz said roughly this: Ladies and Gentlemen of the Jury, this conspiracy alleged by the Government could not possibly have taken place without [fol. 541] active participation of all five of these defendants, and added with the possible exception of Mr. Frazier and Mr. Lott.

These are three circumstances which I think are mitigating circumstances.

The Court: Mr. Lott was the one in charge and okayed everything pertaining to the Greenwood Valley Ranch.

Mr. Ballew: There is no question about that.

The Court: He was not the agent in charge, but the engineer in charge.

Mr. Ballew: He was president of the company, sir, of the Greenwood Valley Ranch.

The Court: And that was his type of engineering project?

Mr. Ballew: Yes, sir, he was the one that built the buildings, and Mr. Frazier paved it.

None of these remarks are materially definitive. He does not duck the responsibility, but I think it is fair to show where he fits in the total picture.

I personally know that this man made a bad decision back in '52 and '53. He is ashamed of what he did then, and he is regretful that he didn't get out of the company like Frank Glass did and Louis Spaw. I don't suppose there is a great deal of difference in Glass' situation and Spaw's and Mr. Lott's, except that he is a much older man [fol. 542] who had a son in college and a daughter. His work was all tied up in these companies.

It would be a more wrenching experience for him to face up to it and quit. He did not quit, and he is sorry. He is here today and I have every confidence in this man.

I will not belabor the Court any further, but we certainly hope that the Court will be lenient in this regard.

The Court: What about your witnesses?

(Witnesses sworn.)

* * * * * * *

[fol. 549] Dr. E. H. Westmoreland, a witness called on behalf of Defendant Lott, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Moody:

Q. You are Dr. E. H. Westmoreland?
A. Yes, sir.
Q. What is your occupation, please?
A. I am pastor of the South Main Baptist Church.
Q. How long have you been there?
A. Twenty-one years.
Q. How long have you lived in Houston?
A. I have lived in Houston since 1938.

Q. Do you know Alvin Lott?

A. Yes, sir, I have known him since 1944.

Q. How did you come to know him?

A. He and his family united with our church. They transferred from a church in New Orleans and became [fol. 550] members of our church shortly after they moved to Houston.

Q. That was when they moved here in 1944?

A. Yes, sir.

Q. Have they continued as members of the church up to the present time?

A. Yes, sir.

Q. Have you had any personal experiences with him, that is, have you done anything outside of church work, have you gone anywhere with him?

A. Yes, sir. Mr. Lott is a very close personal friend. He is a deacon in our church and has been through the years, and I know all of my deacons well, but I know some of them better, because some of them are in the inner circle, like Peter, James and John of our Lord. He is in the inner circle.

Q. Will you tell Judge Hannay what your estimate of Mr. Lott is with respect to honesty, fairness and being a law-abiding citizen?

A. Your Honor, I consider him one of the finest men I have ever known.

Mr. Moody: I believe that is all.

The Witness: I would like to say that every member of our congregation would come here as a witness in his behalf, and they would say he is one of the cleanest Christian men we have ever known.

The Court: But none of them were present during the ten weeks of testimony, were they?

[fol. 551] The Witness: Not that I know of, sir.

(Witness excused.)

Mr. Moody: That is all, Your Honor.

The Court: Is that all, gentlemen?

Mr. Hartman: That is all for the Government, sir.

The Court: I will sentence them at two o'clock. Please be back at that time.

(Recess taken.)

SENTENCING

The Court: Will the defendants and their counsel please stand.

The sentence of the Court on the defendants is as follows: I have found each guilty of the felonies as contained in the Grand Jury indictment.

As to the Defendant Lee Blocker, on Count One $2500 fine to be paid and three years imprisonment to serve. On Count Two, $2500 fine and three years imprisonment to serve. On Count Three, $5000 fine to be paid and three years imprisonment to be served. On Count Number Four, $5000 fine to be paid and three years imprisonment to be served. On Count Number Five, $5000 fine to be paid and three years imprisonment to be served. The prison terms as to each of the five counts are to run concurrently, so [fol. 552] the sentence as far as the Defendant Lee Blocker is concerned, it amounts to $20,000 fine to be paid and three years imprisonment to be served. I will recommend Seagoville.

As to the Defendant H. A. Lott, on Count One, $2500 fine to be paid, two years imprisonment to be served. On Count Number Two, $2500 fine to be paid and two years imprisonment to be served. On Count Number Three, $5000 fine to be paid and two years imprisonment to be served. On Count Number Four, $5000 fine to be paid and two years imprisonment to be served. On Count Number Five, $5000 fine to be paid and two years imprisonment to be served. The prison term, the terms are to run concurrently so the sum total as far as the Defendant Lott is concerned is $20,000 fine to be paid and two years to serve. Each of the five two year terms are to run concurrently one with the other.

As to the Defendant Lorn Frazier, as to Count One, $2500 fine to be paid, two years imprisonment to be served. On Count Number Two, $2500 fine to be paid and two years imprisonment to be served. As to Count Number Three,

$5000 fine to be paid and two years imprisonment to be served. As to Count Number Four, $5000 fine to be paid and two years imprisonment to be served. As to Count Number Five, $5000 fine to be paid and two years imprisonment to serve. Likewise the five two year terms are to be served concurrently, making a sum total of two years and $20,000 fine. I will recommend, as I did in the first instance, Seagoville, Texas, as to be the place of incarceration.

I will likewise continue the bond of each of the defendants for approximately thirty days. Each of them to report to the United States Marshal here in Houston at not [fol. 553] later than ten a.m., on July 20, 1959, to begin service of their respective terms of imprisonment.

Any questions?

That is all, then, Court will stand adjourned under the rules.

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

UNITED STATES OF AMERICA,

v.

LEE BLOCKER.

No. Cr. 13298.

On the 19th day of June, 1959 came the attorney for the government and the defendant appeared in person and1 with counsel.

JUDGMENT AND COMMITMENT—Filed June 22, 1959

It Is Adjudged that the defendant has been convicted upon his plea of2 of nolo contendere of the offense of filing false and fraudulent corporate income tax returns, in violation of Title 26, U. S. Code, Section 145(b), as charged in Counts 1, 2 and 3, and in violation of Title 26, U. S. Code, Section 7201, as charged in Count 4; and the offense of conspiring to file false and fraudulent corporate income tax

returns, in violation of Title 18, U. S. Code, Section 371, as charged in Count 5; and the Court having asked the defendant whether he has anything to say why judgment [fol. 554] should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of4 Three (3) Years on each of Counts 1, 2, 3, 4 and 5, to run concurrently, making a total of three years.

It Is Further Adjudged that the defendant is hereby fined the sums of Two Thousand Five Hundred ($2,500.00) Dollars on Count 1, Two Thousand Five Hundred ($2,500.00) Dollars on Count 2, Five Thousand ($5,000.00) Dollars on Count 3, Five Thousand ($5,000.00) Dollars on Count 4, and Five Thousand ($5,000.00) Dollars on Count 5, to run consecutively making a total of $20,000.00.

It Is Adjudged that the United States of America shall recover from the defendant the sum of $20,000.00, named above, for which execution may issue. In default of payment of said fine, the defendant is to be further committed until the fine is paid or until he shall be otherwise lawfully discharged.

It Is Ordered that the defendant is to report to the United States Marshal at 10:00 A.M., on July 20, 1959, to begin service of this sentence.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal [fol. 555] or other qualified officer and that the copy serve as the commitment of the defendant.

Done the 22nd day of June, 1959.

Allen B. Hannay, United States District Judge.

The Court recommends commitment to:6 Seagoville, Texas.

Approved: F.L.H.

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,

v.

H. A. LOTT.

No. Cr. 13298.

On the 19th day of June, 1959 came the attorney for the government and the defendant appeared in person and1 with counsel.

JUDGMENT AND COMMITMENT—Filed June 22, 1959

It Is Adjudged that the defendant has been convicted upon his plea of2 nolo contendere of the offense of filing false and fraudulent corporate income tax returns, in violation of Title 26, U. S. Code, Section 145(b), as charged in Counts 1, 2, and 3, and in violation of Title 26 U. S. Code, Section 7201, as charged in Count 4; and the offense of [fol. 556] conspiring to file false and fraudulent corporate income tax returns, in violation of Title 18, U. S. Code, Section 371, as charged in Count 5; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of4 Two (2) Years on each of Counts 1, 2, 3, 4 and 5, to run concurrently, making a total of two years.

It Is Further Adjudged that the defendant is hereby fined the sums of Two Thousand Five Hundred ($2,500.00) Dollars on Count 1, Two Thousand Five Hundred ($2,-

500.00) Dollars on Count 2, Five Thousand ($5,000.00) Dollars on Count 3, Five Thousand ($5,000.00) Dollars on Count 4, and Five Thousand ($5,000.00) Dollars on Count 5, to run consecutively making a total of $20,000.00.

It Is Adjudged that the United States of America shall recover from the defendant the sum of $20,000.00, named above, for which execution may issue. In default of payment of said fine, the defendant is to be further committed until the fine is paid or until he shall be otherwise lawfully discharged.

[fol. 557] It Is Ordered that the defendant is to report to the United States Marshal at 10:00 A. M., on July 20, 1959, to begin service of this sentence.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Done the 22nd day of June, 1959.

Allen B. Hannay, United States District Judge.

The Court recommends commitment to:6 Seagoville, Texas.

Approved: F.L.H.

In United States District Court
For the Southern District of Texas
Houston Division

United States of America,

v.

Lorn D. Frazier.

No. Cr. 13298.

On the 19th day of June, 1959 came the attorney for the government and the defendant appeared in person and1 with counsel.

JUDGMENT AND COMMITMENT—Filed June 22, 1959

[fol. 558] It Is Adjudged that the defendant has been convicted upon his plea of2 nolo contendere of the offense of filing false and fraudulent corporate income tax returns, in violation of Title 26, U. S. Code, Section 145(b), as charged in Counts 1, 2, and 3, and in violation of Title 26 U. S. Code, Section 7201, as charged in Count 4; and the offense of conspiring to file false and fraudulent corporate income tax returns, in violation of Title 18, U. S. Code, Section 371, as charged in Count 5; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of4 Two (2) Years on each of Counts 1, 2, 3, 4 and 5, to run concurrently, making a total of two years.

It Is Further Adjudged that the defendant is hereby fined the sums of Two Thousand Five Hundred ($2,500.00) Dollars on Count 1, Two Thousand Five Hundred ($2,500.00) Dollars on Count 2, Five Thousand ($5,000.00) Dollars on Count 3, Five Thousand ($5,000.00) Dollars on Count 4, and Five Thousand ($5,000.00) Dollars on Count 5, to run consecutively, making a total of $20,000.00.

It Is Adjudged that the United States of America shall recover from the defendant the sum of $20,000.00, named [fol. 559] above, for which execution may issue. In default of payment of said fine, the defendant is to be further committed until the fine is paid or until he shall be otherwise lawfully discharged.

It Is Ordered that the defendant is to report to the United States Marshal at 10:00 A. M., on July 20, 1959, to begin service of this sentence.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Mar-

shal or other qualified officer and that the copy serve as the commitment of the defendant.

Done the 22nd day of June, 1959.

Allen B. Hannay, United States District Judge.

The Court recommends commitment to: 6 Seagoville, Texas.

Approved: F.L.H.

IN UNITED STATES DISTRICT COURT

MOTION OF H. A. LOTT IN ARREST OF JUDGMENT—
Filed June 23, 1959

To the Honorable Judge of said Court:

Comes Now H. A. Lott, one of the defendants in the above suit, and, pursuant to Rule 34 of the Federal Rules of Criminal Procedure, respectfully requests this Honorable [fol. 560] Court to arrest its judgment entered herein with respect to him for the following reasons:

I.

The indictment does not state facts sufficient to constitute an offense against the United States.

II.

Counts I through IV are each insufficient as a matter of law to charge an offense against the United States because these counts fail to form a basis for a plea of double jeopardy as to any one or all of them. Their allegations do not sufficiently apprise defendant of what he would have been required to meet at trial.

III.

The indictment fails to charge an offense against the United States with any degree of certainty. The indictment fails to inform defendant of the nature of the accusation in order that he could make his defense thereto.

IV.

The conspiracy count (Fifth Count) is insufficient as a matter of law because it does not expressly allege a conspiracy agreement, if any.

Wherefore, premises considered, defendant H. A. Lott prays that the judgment and sentence with respect to him be arrested and set aside, that the indictment against him [fol. 561] be dismissed, and that he be granted such other relief as justice may demand.

Respectfully submitted,

Denman Moody, W. V. Ballew, Jr., Attorneys for Defendant H. A. Lott, 1600 Esperson Building, Houston, Texas.

Of Counsel: Baker, Botts, Andrews & Shepherd, 1600 Esperson Building, Houston 2, Texas.

Certificate of Service (omitted in printing).

[fol. 562]

IN UNITED STATES DISTRICT COURT.

MOTION OF H. A. LOTT REQUESTING ORAL ARGUMENT—Filed June 23, 1959

To the Honorable Judge of said Court:

Comes Now, H. A. Lott, one of the defendants in the above styled case, and respectfully requests the Court to grant oral argument on his Motion In Arrest Of Judgment, and in connection therewith respectfully shows the Court the following:

I.

Chief counsel for defendant H. A. Lott is Denman Moody and he will be absent from Houston, Texas, from June 24 to July 4, 1959. Defendant H. A. Lott requests that his Motion In Arrest of Judgment not be submitted for this Honorable Court's determination until said counsel has returned to this city, at which time it is requested that oral

argument be granted in connection with his Motion In Arrest of Judgment.

Wherefore, H. A. Lott respectfully prays that the Court grant oral argument upon his Motion In Arrest Of Judgment and that the same be set for submission at any time after July 4, 1959.

Respectfully submitted,

Denman Moody, Attorney for Defendant H. A. Lott, 16th Floor Esperson Building, Houston, Texas.

[fol. 563] Of Counsel: Baker, Botts, Andrews & Shepherd, 16th Floor Esperson Building, Houston, Texas.

IN UNITED STATES DISTRICT COURT

MOTION OF LEE BLOCKER AND LORN D. FRAZIER TO ARREST JUDGMENT—Filed June 23, 1959

To the Honorable District Court:

Lee Blocker and Lorn D. Frazier, defendants, hereinafter referred to as "movants", move, pursuant to Rule 34 of the Federal Rules of Criminal Procedure, that the Court arrest its judgment as to movants, and set aside said judgment and hold it for naught and dismiss the indictment against them for the following reasons:

[fol. 564]

1.

The indictment as a whole and each count of the indictment, both jointly and severally, fail to charge an offense against The United States of America.

2.

The indictment fails to charge an offense with certainty. It merely relates alleged acts that may tend to show an alleged offense but does not actually charge any. It fails to inform movants of the nature and cause of the accusation, in that it is not sufficiently clear and complete to show

a violation of law and to enable movants to know the nature and cause of the charge, so that they would have been able to make their defenses thereto. It fails to apprise movants of what they are charged with, personally, so that they could have been tried only on the charges, if any, which were to be leveled against them, personally.

3.

On their face, Counts 1 through 4, and each of them, are insufficient as a matter of law to charge an offense because they fail to serve as a basis for a plea of double jeopardy as to any one or all of them. Their allegations do not sufficiently apprise movants of what they would have been required to meet at trial. Movants were entitled to this information and it could not be supplied by inference or implication, and it could not be aided by resort to the averments of overt acts contained in the Fifth Count.

[fol. 565]

4.

Substantive Counts 1 through 4, and each of them, are insufficient as a matter of law in that they are multifarious. Instead of attempting to charge a single offense they attempt to charge many offenses, which, if they charge offenses at all, which is not admitted but expressly denied, each of the alleged substantive matters, if any, should have been made the object of separate counts.

5.

The Fifth Count, which is supposed to be the conspiracy count, is insufficient as a matter of law in that it does not distinctly and directly allege the conspiracy agreement, if any. It cannot be aided by inference or implication. The Count goes on to allege that certain acts were done, ostensibly as evidentiary matters pointing to what was agreed to be done (if any agreement in fact existed, which is not admitted but is expressly denied), but to allege evidentiary matters is not an allowable substitute for a clear statement of the agreement which the Government proposed to attempt to prove.

6.

The conspiracy count is subject to at least two further objections: (1) Either the same crime is charged in the substantive counts as is attempted to be charged in the conspiracy count; or (2) this is a situation where the agreement of the defendants was necessary for the completion of the alleged substantive crime and no ingredient of conspiracy is present in the alleged completed crime. In either [fol. 566] instance, the conspiracy count is fatally defective.

7.

Heretofore, movants timely filed their motion to quash the indictment against them. Said motion heretofore overruled, is now re-offered in its entirety and is incorporated by reference herein and made a part of this motion for all purposes.

Wherefore, premises considered, movants pray that the judgment and sentences of movants be arrested and set aside and that the indictment against them be dismissed, and that movants be granted such other relief as may be required to serve the ends of justice.

Fulbright, Crooker, Freeman, Bates & Jaworski, By John H. Crooker, Attorneys for Lee Blocker and Lorn D. Frazier, Bank of the Southwest Building, Houston 2, Texas.

Certificate of Service (omitted in printing).

[fol. 567]

IN UNITED STATES DISTRICT COURT

MOTION OF LEE BLOCKER AND LORN D. FRAZIER REQUESTING ORAL ARGUMENT—Filed June 23, 1959

To the Honorable District Court:

Lee Blocker and Lorn D. Frazier, defendants, respectfully request the Court to grant oral argument upon their Motion To Arrest Judgment, and in connection therewith show:

1.

As heretofore made known to the Court by counsel for movants, counsel who has signed this motion as well as the Motion To Arrest Judgment, will be absent from the State commencing Wednesday, June 24th, for a period of about two weeks. Said counsel will be back in the city not later than the 10th of July.

2.

Therefore, it is respectfully requested that this motion not be submitted for the Court's consideration and determination until after said counsel returns to the city, at which time counsel desires to present oral argument on said motion.

Wherefore, it is respectfully prayed that the Court grant oral argument upon the motion of Lee Blocker and Lorn D. Frazier to arrest judgment and that the same be set for submission after counsel's return to this city—at any time after July 10, 1959, and that these defendants have such [fol. 568] other relief to which they may show themselves entitled.

Fulbright, Crooker, Freeman, Bates & Jaworski, By John H. Crooker, Counsel for Lee Blocker and Lorn D. Frazier, Bank of the Southwest Building, Houston 2, Texas.

Copies of the foregoing motion have been served upon all other defendants in this cause and upon the United States in each instance by mailing same to the offices of their respective counsel of record.

John H. Crooker

Government's Answer to Motion of H. A. Lott in Arrest of Judgment; Omitted from the printed record pursuant to the designations of counsel as to printing record heretofore copied at pages 1 & 7.

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION TO ARREST JUDGMENT

"July 13, 1959: Defendants Lee Blocker and Lorn D. Frazier's Motion to Arrest Judgment is Overruled.

Clerk will notify counsel.

(S.) Allen B. Hannay, United States District Judge."

[fol. 569]

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION TO ARREST JUDGMENT

"July 13, 1959: Defendant H. A. Lott's Motion in arrest of Judgment is Overruled. Clerk will notify counsel.

(S.) Allen B. Hannay, United States District Judge."

IN UNITED STATES DISTRICT COURT

MOTION OF H. A. LOTT FOR REDUCTION OF SENTENCE OR PROBATION—Filed July 15, 1959

To the Honorable Judge of said Court:

Comes Now H. A. Lott, one of the defendants in the above suit and, pursuant to Rules 35 and 32(e) of the Federal Rules of Criminal Procedure, respectfully requests the Court to suspend the penitentiary sentence imposed upon him on June 19, 1959, or, in the alternative, to suspend the penitentiary sentence and place defendant H. A. Lott on probation as provided by law in order that the ends of justice and the best interest of the public as well as this defendant may be served thereby, and in support thereof would show unto the Court the following:

I.

Defendant H. A. Lott has no previous criminal record. He is sober, conscientious and an industrious citizen who

[fol. 570] has wofked in this part of the country since graduation from high school. He is married and has two grown children. His standing in the community is good, this conviction constituting the only blot on his record of 51 years.

II.

The sentence of June 19, 1959 imposed a fine of $2500 for each of the five counts contained in the indictment (totaling $20,000). Defendant H. A. Lott is willing and hereby offers to pay the said fine promptly.

III.

Defendant H. A. Lott is willing and hereby offers to make whatever restitution is deemed proper by this Court to his former employer, Farnsworth & Chambers Co., Inc., arising out of any benefits this defendant may have received from said Company which resulted in said Company paying a lesser amount of Federal income taxes than would otherwise be the case.

Wherefore, defendant H. A. Lott respectfully requests the Court to exercise the discretion granted it by Rule 35 of the Federal Rules of Criminal Procedure and suspend the execution of the penitentiary sentence of 2 years, or, in the alternative, to suspend the execution of said penitentiary sentence and place the defendant H. A. Lott on probation for such period and upon such terms and conditions as the Court deems best. Defendant H. A. Lott also re- [fol. 571] quests that this motion be acted upon at the Court's earliest convenience.

Respectfully submitted,

Denman Moody, W. V. Ballew, Jr., Attorneys for Defendant H. A. Lott, 16th Floor, Esperson Building, Houston 2, Texas.

Of Counsel: Baker, Botts, Andrews & Shepherd, 16th Floor, Esperson Building, Houston 2, Texas.

Certificate of Service (omitted in printing).

[fol. 572]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL OF H. A. LOTT—Filed July 15, 1959

Name and address of appellant:

H. A. Lott, 3502 Amherst, Houston, Texas.

Name and addresses of appellant's attorneys:

Denman Moody and W. V. Ballew, Jr., Baker, Botts, Andrew & Shepherd, 16th Floor, Esperson Building, Houston, Texas.

Offense:

Evasion of corporate taxes owed by Farnsworth & Chambers Company, Inc., to the United States of America, for the calendar years 1951, 1952, 1953 and 1954 in violation of Section 145(b) of the Internal Revenue Code of 1939 for the years 1951, 1952 and 1953 and in violation of Section 7201 of the Internal Revenue Code of 1954 for the year 1954 (first four counts); unlawfully conspiring to evade such taxes for said calendar years in violation of Section 371, Title 18, United States Code (fifth count), to which, with the consent of the Court appellant H. A. Lott plead nolo contendere to each of said five counts.

Concise statement of judgment or order, giving date and any sentence:

Guilty to all five counts made by the trial Court on June 19, 1959, and sentence was imposed on June 19, 1959, fining appellant $2,500 on each of the five counts (total $20,000) and sentencing appellant to the federal penitentiary for [fol. 573] two years on each of the five counts, such sentences to run concurrently.

Name of institution where now confined, if not on bail:

Appellant is out on bail.

H. A. Lott, the above named appellant, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the above stated judgment.

Dated: July 15th, 1959.

Denman Moody, W. V. Ballew, Jr., Attorneys for Defendant H. A. Lott.

Of Counsel: Baker, Botts, Andrews & Shepherd, 16th Floor Esperson Building, Houston 2, Texas.

[fol. 574] Certificate of Service (omitted in printing).

[fol. 575]

IN UNITED STATES DISTRICT COURT

EXCERPT OF CLERK'S DOCKET ENTRIES ON JULY 16 AND 17, 1959

7-16 Oral hearing on Deft. Lott's Motions for Bail, for Reduction of Sentence or Probation, and to Stay Sentence to Pay Fine Pending Appeal (ABH) Court's ruling: Motion to Stay Sentence to Pay Fine Pending Appeal—overruled.

Motion for Reduction of Sentence or Probation—if Court has jurisdiction at this time, motion overruled.

Motion for Bail—continued until July 17, 1959.

7-16 Motion for Rehearing of Motion to Arrest Judgment, filed (Blocker and Frazier)

7-16 Affidavit of Otis M. Brigman, filed (Exhibit in support of motion for rehearing of motion to arrest judgment—Blocker and Frazier)

7-17 Outline of Mr. Schwartz's Opening Statement to the Jury Made on April 7, 1959, filed (Exhibit in Support of motion for rehearing of motion to arrest judgment—Blocker and Frazier)

7-17 First Amended Motion for Bail, filed (Lott)

7-17 Joint Notice of Appeal, filed (Blocker and Frazier)

7-17 Joint Motion for Bail Pending Appeal, filed (Blocker and Frazier)

7-17 Joint Motion for Suspension of Sentence or Probation, filed (Blocker and Frazier)

7-17 Motion to Strike, filed (Govt. objecting to filing of affidavit of Otis H. Brigman on 7-16-59)

7-17 Oral order granting First Amended Motion for Bail, fixing bond at $5,000—new bond to be executed—entered (ABH) (Lott)

7-17 Appearance Bond of Defendant H. A. Lott, filed ($5,000—Travelers Indemnity Company, surety)

[fol. 576]

7-17 Oral hearing on following motions of Defts. Blocker and Frazier (ABH): Motion for Rehearing of Motion to Arrest Judgment—overruled. Joint Motion for Suspension of Sentence or Probation—overruled. Joint Motion for Bail Pending Appeal and oral motion for supersedeas—Motion for bail, granted; each deft's bond set at $5,000. Oral motion for supersedeas or stay pending appeal to pay fine, overruled.

[fol. 578]

IN UNITED STATES DISTRICT COURT

MOTION OF LEE BLOCKER AND LORN D. FRAZIER FOR REHEARING OF MOTION TO ARREST JUDGMENT—Filed 16 day of July, 1959

To the Honorable District Court:

Now Come defendants, Lee Blocker and Lorn D. Frazier, and move that this Honorable Court grant a rehearing and a re-submission on their motion to arrest judgment, and in support hereof, respectfully show:

1.

Heretofore, defendants filed their written motion requesting oral argument along with their motion to arrest judg-

ment. Defendants know that they are not entitled to oral argument as a matter of right, but they anticipated some ruling by the Court on their motion for oral argument prior to submission.

[fol. 579] 2.

While awaiting the Court's ruling on the motion for oral argument, defendants' counsel set about preparing a brief and affidavit in support of their motion to arrest judgment. Counsel have been working diligently since that time to put the brief and affidavit in final form, anticipating that they would be timely filed on receiving notice of a submission date from the Court.

3.

On July 14, 1959, counsel for defendants learned, for the first time, that their motion to arrest judgment had been denied. Counsel had no notice, prior to said time, of the Court's decision on defendants' motion for oral argument or the Court's desires regarding submission date.

4.

Upon learning of the Court's ruling, there were quickly placed in final form two affidavits in support of the motion to arrest judgment and there were assembled informal memoranda of authorities and the substance of supporting oral argument, which we believe would be helpful to the Court in its decision on the motion to arrest judgment. It is respectfully requested that the Court consider said affidavits and, in the light of them, reconsider its decision and resubmit defendants' motion in arrest of judgment—either with or without oral argument, as the Court may please.

[fol. 580] Wherefore, it is prayed that this Honorable Court grant defendants a rehearing on their motion to arrest judgment by resubmission on such date as meets with the Court's convenience; that we be granted an opportunity to argue orally with respect to same; and in the alternative, that the Court reconsider defendants' motion to arrest judgment along with said affidavits in support of it without

oral argument, and that defendants have such other relief to which they may be entitled.

Joe Moss, John H. Crooker, Attorneys for Lee Blocker and Lorn D. Frazier.

My name is John H. Crooker; I am counsel of record for Lee Blocker and Lorn D. Frazier, defendants in the above action. I have prepared the foregoing motion and it is true and correct.

John H. Crooker

Subscribed And Sworn To before me on July 14, 1959.

Elizabeth Moreau, Notary Public in and for Harris County, Texas.

(Seal)

Triplicate copy of the above motion has been served upon the United States Attorney, and extra copies have been served upon the attorneys of record for defendants, Mr. [fol. 581] H. A. Lott and Richard A. Farnsworth, Sr., in accordance with law.

John H. Crooker

[fol. 610]

IN UNITED STATES DISTRICT COURT

OUTLINE OF MR. SCHWARTZ'S OPENING STATEMENT TO THE JURY MADE ON APRIL 7, 1959—Filed 17 day of July, 1959

Exhibit In Support of Motion for Rehearing of Motion to Arrest Judgment

(As reported by Charles W. Hall, attorney with Fulbright, Crooker, Freeman, Bates & Jaworski.)

Mr. Schwartz stated that the Government's evidence would show five general areas of attempted tax evasion:

1. Unreported income: About $70,000 received by Farnsworth & Chambers Co., Inc., was not reported as income. This included income from bulldozing work, dirt work, cleaning ditches, constructing roads, and sales of timber.

2. Residences: Expenditures on the residences of Mr. Chambers and Mr. Farnsworth were charged to other jobs and taken as corporate deductions. About $230,000 on Mr. Chambers' 3990 Inverness residence, about $35,000 on Mr. Farnsworth's 1407 Kirby Drive residence, and about $4,000 on Mr. Farnsworth's 3126 Newcastle residence were incorrectly charged.

3. Executives' personal expenses: About $68,000 of personal expenditures were charged to jobs and taken as corporate deductions. The vast bulk of these expenditures were for Mr. Chambers and Mr. Farnsworth, but Messrs. Blocker, Frazier, and Lott had personal expenditures charged to jobs. For examples, Mr. Frazier obtained a set [fol. 611] of golf clubs and Mr. Blocker obtained a water system on some land of his.

4. Greenwood Valley Ranch: About $250,000 was expended improving the ranch, and $20,000 a year was paid as rent for using the ranch. All but about $18,000 of the improvements were charged to other jobs. About $125,000 of the $250,000 total was expended on the ranch, exclusive of the lodge, and about $103,000 thereof was expended on the lodge.

5. Expensing instead of capitalizing heavy equipment and other assets of Farnsworth & Chambers Co., Inc.:

Mr. Schwartz spent almost an hour discussing these five general areas. He gave in detail the amounts and the names of the payees of the amounts which made up the totals shown. For example, with respect to Mr. Chambers' residence he outlined over 25 items which made up the $230,000 total.

The end result of this was stated to be that corporate income was reduced by about $750,000 to $1,000,000 and taxes thereon were reduced by over $500,000.

This reduction in taxes was accomplished through irregular accounting practices, including the handling of invoices for merchandise and services, submitted for payment by the corporation, in such a way as incorrectly to charge the payments to the cost of unrelated construction jobs. Sometimes the invoices were simply charged incor-

rectly to unrelated construction jobs. Other times the invoices were sent back to the vendors for resubmission in [fol. 612] changed form or were retyped in the Farnsworth & Chambers Co., Inc., office.

* * * * * * *

I, Charles W. Hall, hereby certify that I was personally present in Court on April 7, 1959, when Mr. Newton Schwartz, Assistant United States Attorney, made his opening statement to the jury in the trial of United States vs. Richard A. Farnsworth, Sr., et al.. I made copious notes of his opening statement, and the above and foregoing is a true and correct outline of it.

CHARLES W. HALL,
(Charles W. Hall).

Subscribed and sworn to before me on July 14, 1959.

ELIZABETH MOREAU,
(Elizabeth Moreau),
Notary Public in and for
Harris County, Texas.

[fol. 613]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

THE UNITED STATES OF AMERICA,

v.

LEE BLOCKER and LORN D. FRAZIER.

Cr. No. 13,298.

JOINT NOTICE OF APPEAL OF LEE BLOCKER AND LORN D. FRAZIER—Filed 17 day of July, 1959

To the Honorable District Court:

Now come Lee Blocker and Lorn D. Frazier, defendants herein, and file this, their notice of appeal to the United

States Court of Appeals for the Fifth Circuit for each of them, and in connection therewith respectfully show:

1.

Appellant Lee Blocker is a resident citizen of the City of Hedwig Village, Harris County, Texas, and his address is 9 Hedwig Circle. The appellant Lorn D. Frazier is a resident citizen of Houston, Harris County, Texas, and his address is 3302 Lawrence Street.

2.

Appellants, and each of them, were convicted and sentenced, upon the first four counts of the indictment, for attempted evasion of corporate taxes owed by Farnsworth & Chambers Co., Inc., to the United States of America for the calendar years 1951 through 1953 in violation of Section 145(b) of the Internal Revenue Code of 1939, 26 U.S.C. [fol. 614] 145(b), and attempted evasion of said taxes for the calendar year 1954 in violation of Section 7201 of the Internal Revenue Code of 1954. They were also convicted and sentenced under the fifth count for conspiring to attempt to evade such taxes for said calendar years in violation of Section 371, Title 18, United States Code. To all these offenses, upon proper application and with the consent of the Court, these appellants, Lee Blocker and Lorn D. Frazier, and each of them, pleaded nolo contendere.

3.

The Court found appellants guilty and sentenced each of them under all five counts, on June 19, 1959. Each was fined $2500 on each of the first two counts along with $5000 on each of the last three counts, for total separate fines of $20,000. Appellant Lee Blocker was sentenced to the Federal penitentiary for terms of three years on each of the five counts, such sentences to run concurrently. Appellant Lorn D. Frazier was sentenced to the Federal penitentiary for terms of two years on each of the five counts, such sentences to run concurrently.

4.

Appellants, and each of them, are represented herein by Mr. Joe Moss, Niels Esperson Building, Houston, Texas, and Mr. John H. Crooker, of the firm of Fulbright, Crooker, Freeman, Bates & Jaworski, Bank of the Southwest Building, Houston, Texas.

[fol. 615]

5.

Appellants Lee Blocker and Lorn D. Frazier, and each of them, are presently at liberty pursuant to bail bonds granted by this Honorable Court.

6.

Appellants Lee Blocker and Lorn D. Frazier, and each of them, hereby appeal from the above stated convictions, sentencings, and judgments, to the United States Court of Appeals for the Fifth Circuit on July 17, 1959.

Joe Moss, John H. Crooker, Attorneys for Defendants Lee Blocker and Lorn D. Frazier, Bank of the Southwest Building, Houston 2, Texas.

Triplicate copy of the foregoing has been served upon the United States Attorney and counsel of record for Mr. H. A. Lott in accordance with law.

John H. Crooker

Joint Motion for Bail Pending Appeal for Lee Blocker and Lorn D. Frazier; Omitted from the printed record pursuant to the designations of counsel as to printing record heretofore copied at pages 1 & 7.

* * * * * * *

[fol. 616]

IN UNITED STATES DISTRICT COURT

JOINT MOTION OF LEE BLOCKER AND LORN D. FRAZIER FOR SUSPENSION OF SENTENCE OR PROBATION—Filed 17 day of July, 1959

To the Honorable District Court:

Now come Lee Blocker and Lorn D. Frazier, and each of them, defendants in the above suit, and pursuant to the provisions of Section 3651, Title 18, United States Code, and Rule 32(c) of the Federal Rules of Criminal Procedure, respectfully request this Honorable Court to suspend the penitentiary sentences imposed upon them, and each of them, on June 19, 1959. In the alternative, it is respectfuliy requested that this Honorable Court suspend these penitentiary sentences and place defendants, Lee Blocker and Lorn D. Frazier, and each of them, on probation under such conditions as the Court deems proper. In support, defendants respectfully show:

1.

The sentences of June 19, 1959, imposed a fine on each of the defendants of $2500 for each of the first two counts of the indictment, along with a fine of $5000 for each of the last three counts of the indictment. This amounts to a $20,000 fine for each defendant. Defendants, and each of them, respectfully hereby assure this Honorable Court that they, and each of them, have made arrangements to raise enough money to pay their respective fines in full, and such fines will be paid by the end of this day, July 17, 1959, to the United States of America.

[fol. 617]

2.

Defendants, and each of them, have offered, and hereby do offer as a matter of public record, to make full restitution to their employer, Farnsworth & Chambers Co., Inc., all money, benefits and any other things of value which these defendants, and each of them, received from said

Company, which resulted in said Company paying less Federal income taxes than it would have paid otherwise. This monetary figure is currently in the process of being determined by Farnsworth & Chambers Co., Inc., so that such restitution shall be made.

3.

Defendant, Lee Blocker, is a native citizen of Houston, Harris County, Texas, and has resided here all his life. He lives at 9 Hedwig Circle with his devoted wife and three little daughters, whose ages are fourteen, eleven and one-half and five years. He is an active member of the Fourth Church of Christ, Scientist. He is, and has been for many years, engaged in a useful occupation in the construction business in Houston, Harris County, Texas, with his present employer, Farnsworth & Chambers Co., Inc. He has no previous criminal record and up until the time of this conviction has enjoyed the reputation of being a peaceful, law abiding, and respected citizen, leading a useful life and engaging actively in civic work.

4.

Defendant Lorn D. Frazier was born in the State of Louisiana. He has lived in Houston, Harris County, Texas, [fol. 618] for the past fourteen years. He resides at 3302 Lawrence Street with his devoted wife and two children, a boy, age ten, and a girl, age fourteen years. He is an active member of the Catholic Church of St. Rose of Lima. He is, and has been for many years, engaged in a useful occupation in the construction business in Houston, Harris County, Texas, with his present employer, Farnsworth & Chambers Co., Inc. He has no previous criminal record and up until the time of this conviction has enjoyed the reputation of being a peaceful, law abiding, and respected citizen, leading a useful life and engaging actively in civic work.

5.

From the inception of this prosecution, over a year ago, these defendants, and each of them, have suffered greatly

from the humiliation caused by the public charges against them and from the resulting loss of prestige and stature in the business world and community in which they live. The strain and tension throughout this long period of time, in connection with this prosecution, have been enhanced by the resulting distress rendered more severe by the financial strain of the imposition of fines and the necessity of making restitution to their employer, Farnsworth & Chambers Co., Inc.

Because of the close ties existing between each defendant and the members of their respective families, their punishment has not alone been their own punishment, but punishment shared by their respective wives and children. The tensions and uncertainties stemming from this prosecution [fol. 619] have punished severely both defendants and their respective loved ones, whose well being are inseparable from their own.

6.

It is respectfully suggested that justice will not be sacrificed or frustrated if the execution of the respective sentences of imprisonment is now suspended. This is so because of the great suffering heretofore and currently being experienced by each defendant and their respective families. Further, these defendants, and each of them, can and will contribute richly as law abiding, devout, sober and industrious citizens to the society and community in which they live if they may remain at large under suspended sentences. Defendants' respective families desperately need their financial support, comfort and guidance. Because each of defendants has sincerely determined never to violate the law of the land, society about them will benefit from their contribution at useful endeavors if they be relieved of the necessity of languishing in prison.

Wherefore, defendants, Lee Blocker and Lorn D. Frazier, and each of them, respectfully request this Honorable Court to suspend the execution of the penitentiary sentences of two years in the case of Lorn D. Frazier and three years in the case of Lee Blocker, or in the alternative, to suspend the execution of said penitentiary sentences and each of

them, and place these defendants, and each of them, on probation for such period and under such conditions and terms as this Honorable Court deems best in the premises.

Respectfully submitted,

[fol. 620] Joe Moss, John H. Crooker, Attorneys for Defendants, Lee Blocker and Lorn D. Frazier, Bank of the Southwest Building, Houston 2, Texas.

[fol. 622]

IN UNITED STATES DISTRICT COURT

Reporter's Transcript of Proceedings

APPEARANCES:

Fred L. Hartman, Esq., Assistant United States Attorney, Post Office Building, Houston, Texas.

Newton B. Schwartz, Esq., Assistant United States Attorney, Post Office Building, Houston, Texas, For the Government.

John H. Crooker, Sr., Esq., Fulbright, Crooker, Freeman, Bates & Jaworski, Bank of the Southwest Building, Houston, Texas.

Joe S. Moss, Esq., Esperson Building, Houston, Texas, For the Defendants Lee Blocker and Lorn D. Frazier.

Proceedings

COLLOQUY BETWEEN COURT AND COUNSEL—July 17, 1959

The Court: Yes, gentlemen?

Mr. Crooker: Judge, I am sorry I got here about a minute after you went out that door, but I did the best I could. I assume that Your Honor read the two affidavits which we left yesterday with the motion?

The Court: Mr. Brigman's?

Mr. Crooker: Yes.

The Court. The one of Mr. Timmons?

[fol. 623] Mr. Crooker: Somehow I think it was. Of course, I wouldn't have known even if they were.

The Court: Let's see, there is one of Mr.—

Mr. Crooker: Mr. Brigman is the one who attended those conferences. Malcolm McCorquodale attended all of them, but he is dead. I got in on one of them.

The Court: There is one affidavit here. You said two affidavits?

Mr. Crooker: One attached to the motion, Judge, that is referred to in it. The Austin conference about which Mr. Brigman testifies was taken down in shorthand and transcribed and is attached to it.

The Court: This is the whole thing?

Mr. Crooker: And then there is a second one, the outline of Mr. Schwartz's opening statement.

The Court: Where is that?

Mr. Crooker: I filed it yesterday.

I certainly gave counsel for the Government an extra copy and I thought I was—

[fol. 624] The Clerk: Is this it?

Mr. Crooker: Yes, I gave one back and you ought to look at the Court's copy.

The Court: All right.

Mr. Crooker: I gave counsel for the Government one yesterday and gave the Baker, Botts folks a copy of it and I thought that I had filed one. Obviously I didn't. I was mistaken about it. It is simply a brief outline as taken down by Mr. Charlie Hall in our office in what Mr. Schwartz said in the opening statement to the jury. I am offering it in connection with the insufficiency of the indictment. While that is being filed, Your Honor, I am not going to argue this motion extensively. I stated I wasn't, as a matter of right, entitled to it. I will state that one purpose that I had in filing these additional exhibits was to indicate the view from which we think the sufficiency of the indictment ought to be considered.

Now, all of the matters, the opening statement for example, we simply want to show there the Government may know, I mean the elements of the offense, that is a legal matter that is under all along, and I think you passed on it.

The Court: This came about after the extensive argument on motion to dismiss.

[fol. 625] Mr. Crooker: Yes, it did.

The Court: And after the Court had permitted the plea of nolo contendere on behalf of the three defendants, and only the Two Farnsworths were on trial at that time.

Mr. Crooker: That is correct.

Now, for whatever it is worth I simply want to get it in the record, Your Honor, and certainly I did want to stress the one purpose, not the sole purpose, but one purpose in filing that was to make the affidavit of record rather than have our statement that it wasn't in the appeal if we come to filing one, or to say that we were asking for mere time and so forth.

Your Honor has passed on a similar matter here just now and therefore I have no purpose in prolonging it. I will say I had prepared what I think was a very, to me, maybe because I prepared it, a very persuasive brief.

The Court: This isn't one of your more modest days?

Mr. Crooker: One of those days that comes every decade or such thing.

If Your Honor will pass on that motion and have the judgment and resubmit it and in the light of these two exhibits I assume you are ready to pass on it?

[fol. 626] The Court: That's right. Overruled.

Mr. Crooker: Then we want to file something else. I would like that order to show that the filing of the two exhibits was allowed and considered and so forth.

The Court: It will be considered. Let the record show that it was filed.

Mr. Hartman: Your Honor, before any papers are filed, I would like the record to show we object to the filing of those affidavits and those statements. A motion has been prepared to strike them from the record that they are introduced too late. They are not part of this record. That motion in arrest of judgment is determined from the indictment, the plea, and the sentence and nothing else. The Court hearing this case will recall he very tediously explained the rights to these defendants. The offense and the charge to determine whether or not it was voluntary. They have admitted all of the facts in this indictment.

These are coming too late. They serve no purpose except to rehash the facts.

The Court: I would be glad to see whatever you have to file before I make the final decision. I will hear any objections to your objection from Mr. Crooker or Mr. Moss.

[fol. 627] Mr. Crooker: I do not object to his objections. I object to any merit in them.

The Court: I wonder, I do not want to take it out of context, but whatever you have to file, if you will give them to me at one time, then I will know whether he was going to answer something in writing and have it all before me rather than piecemeal.

Mr. Crooker: I simply got from him what I gave him yesterday and I gave him another copy this morning. Now, I want to file the three copies signed, two to go to you and the Clerk, and one goes to them, but I am tendering three copies of a motion for suspension of sentence or probation on behalf of both Mr. Blocker and Mr. Frazier.

I would like, Your Honor, if you do not mind to glance over that motion, beginning at paragraph 1—

The Court: I will do better than that. I will read it carefully.

Mr. Crooker: Thank you.

Judge, the only supplement I want to make at all to that, I think the matter is fairly well presented to you. The whole matter came pretty well in front of you in the trial of the defendants you had on trial.

The Court: And on the day of sentence.

[fol. 628] Mr. Crooker: Now, on that date Mr. Blocker himself made a personal statement to Your Honor and I am quite sure you heard it. I have no doubt of that, and I don't want to worry you with it or press it unduly. I don't know just what reaction you had to it, and I am not asking, but I am saying that I had the stenographer—I was a little worried about it, and I had the stenographer make the transcript and I have it here. Blocker made some brief references to his age and the fact when the company was organized, even then he had been with them four or five years.

The Court: If you have the transcript, I will be glad to read it.

Mr. Crooker: I did some underscoring for my purposes.

The Court: I have read it.

Mr. Crooker: May I suggest just one other brief matter. With respect to Mr. Frazier, the other defendant whom we represent, he did not make any statement upon sentence personally. I may say to you that we lawyers are responsible for that. It was our judgment then and still is that as a poor speaker under stress, Mr. Frazier is a very splendid construction superintendent, but nevertheless he did feel as contrite and was as ready to admit his misdoings, misdeeds. It was the same as the other defendants in my judgment. [fol. 629] The Court: I know he says he made mistakes and so forth. If you analyze that statement, all Mr. Blocker admits is accounting irregularities. You and I would probably call it by a harsher word.

Mr. Crooker: Something ought to be left to the imagination of a man as smart as you are. For example, everybody rationalizes what he does. One says this is a slick business deal and the other says he crooked me. I get your viewpoint, and I hope you get mine.

I did want to mention that about Frazier, though, the fact he made no public statement but he does in this motion and swears to it.

The Court: He is before the Court as well as Mr. Blocker. Mr. Blocker, I am sure, instigated it, but I don't believe there is a day I have not received letters to this same effect, to the effect that the man is civic minded and a good churchman.

Mr. Crooker: I know that he has not.

The Court: I have gotten at least six or eight, I think, including the last mail.

Mr. Crooker: If he and I had not—

[fol. 630] The Court: Then, on last Friday, a week from this Friday and you were not here, Mr. Blocker came over and wanted to talk to me privately, so Mr. Costa told me. I didn't see him. It was three-thirty in the afternoon. I told him I would be glad to hear him in open Court, in the presence of his lawyers and in the presence of the Government lawyers, and that still stands.

Mr. Crooker: I was not in town when that occurred. It was the week before I got back.

The Court: It was two weeks from today, if I recall correctly.

Mr. Crooker: I wasn't in town and had no idea about it and had no connection with it.

The Clerk: He stated that, Mr. Crooker.

The Court: The only reason I mentioned it was if he wanted to talk, I would be glad to hear him now.

Mr. Crooker: Let me say I think this is all I will say here, and I hope you understand it. It is accurate. You understand the circumstances that prompted him to do it, I think you would understand he wasn't trying to transgress upon the privacy of your office.

[fol. 631] The Court: That is all right, but since he had made the attempt, I felt it only fair to tell you and to offer him the opportunity now.

Mr. Crooker: There was some matters about the possible sale of his home, he wanted to find out about it. I don't know. My judgment is—I know what it is.

The Court: The only thing I wanted to do was offer him the opportunity now if he would like.

Mr. Crooker: He got a copy of this motion for suspended sentence and probation in the alternative.

Now, Your Honor, as I understand, did you act on that? I do not believe you did. I do not think we have anything further to offer in connection with it. We would be glad to address ourselves to any phase of it. I am not expecting Your Honor to run our end of this matter. You have got quite a lot to do.

The Court: The only thing I suggested, either the two defendants represented by you or one of them might want to make a statement or add something. Then I would afford them the opportunity.

Mr. Crooker: I have stated the substance of what he would have said. My judgment about it is it is a matter that you wouldn't have to draw on your imagination to know [fol. 632] about the facts anyway, very much, and I think we won't offer anything further.

Mr. Hartman: Your Honor, the Government would object to the motion of the defendant to reduce sentence on behalf of Frazier. We submit the facts justify the sentence imposed on these two defendants. We only have the benefit of

the facts adduced here. We do not have the benefit of the probation examiner's report. We think the facts would justify an even greater sentence and we object to it.

The Court: The motion for suspension of sentence or probation of the Defendant denied and overruled.

Mr. Crooker: I am getting at two more matters here. Your Honor, I have in my hands motions, a joint motion in behalf of each and both of the Defendants Blocker and Frazier, joint notice of appeal and the joint motion for bail pending appeal. These were prepared yesterday and there is one phase of it I want to call to your attention.

First, I don't want to file that notice of appeal unless and until I file with it the motion for bail. I don't want any questions on earth about your jurisdiction. My mind is clear on it. You went into that question very well this morning.

The Court: Thank you.

[fol. 633] Mr. Crooker: There is one phase of it to which I want to call your attention which I discovered only this morning. This motion for bail—no, the motion for suspension of sentence or probation states in it that defendants have arranged for the raising of the money necessary to pay their fines and will pay them during the day.

The Court: You were a little less crude than Mr. Moody. He propositioned me. He said if you will do this we will do that.

Mr. Crooker: Maybe I will learn from that, Judge.

I might have made the same mistake.

Here is a thing that arises this morning. I didn't discover it personally, but Mr. Joe Moss did. He thinks if those fines are paid and sent in to the Treasury of the United States; that an Act of Congress can't get them back if the indictment is quashed even if on appeal the defendant should prevail.

The Court: I am not familiar with that. As I stated to Mr. Moody, there were only two instances in which I recall there was an appeal and payment made into the Registry of the Court.

That is, however, for you to decide. Mr. Cash had one of the cases and it was a housing case. The other was an insurance man in the same area but a different lawsuit. He

was represented by Douglas MacGregor who was a former [fol. 634] United States District Attorney. If I recall rightly, he paid the fine and appealed from the sentence and I don't know what the mechanics of it were.

Mr. Crooker: In the utmost good faith we made an arrangement to pay it, and it was our purpose and intention until this morning to pay it and I want Mr. Moss to outline to Your Honor and he can give you briefly two cases passed on by the United States Supreme Court that convinced me that high water and acts of Congress and two or three other things can't get the money back.

The Court: Not through the Court of Claims?

Mr. Crooker: I don't mind telling you I never heard of it until this morning, but Mr. Moss has looked into it and I would like to yield in his favor at the moment.

The Court: Well, I didn't grant it with that theory. If I had granted the probation, then there would be some problem.

Mr. Crooker: But I don't want to make a statement even in that motion to suspend which Your Honor has overruled. All I am saying now is we would prefer, much prefer, and we are convinced we can't safely turn that $20,000 in and let it go into the Treasury of the Court.

[fol. 635] The Court: Is that twenty or forty thousand.

Mr. Crooker: I have a profound respect for that much money. We want to file a suit instead. I want to acquaint Your Honor with it. It would be interesting to you to hear Mr. Moss.

The Court: I would be happy to, surely.

Mr. Moss: If the Court please, at the outset I approached this thing on the theory that the appeal is substantial and not frivolous or for purposes of delay only.

The Court: I have a contrary view.

Mr. Moss: I make that statement as a point of personal privilege more than it has bearing on the merits.

In the year 1920—

The Court: Will you give us the citation?

Mr. Moss: Case of the United States of America versus Gettinger, et al., 71 Law Edition 499. I don't have the other citations, but it appears to be 272 U.S. 732, I guess.

[fol. 636] The Court: Our library has the United States Reporter.

Mr. Moss: It was decided in the year 1921—no, it was 1927 by a unanimous Court. The opinion is less than half a page long.

The Court: What is your citation in the Teapot Dome?

Mr. Moss: I frankly do not know. Could I call it over? It is not in point because it is a civil action.

In that case the Court recognized they protested and they stated the procedure.

The Court: If they entered the plea of nolo contendere, they more or less used that as an inducement to get the plea allowed. I think that is your problem as far as what you want to do about it.

Mr. Moss: In view of that, we respectfully request the Court to allow us to supersede the feature which we are sure will be good and sufficient and subject to the approval of any particular authority the Court might want to prove the bail with the supersedeas feature in it. As I understand the statute, it carries interest in the event it is ultimately paid. There is no way anyone could be wrong or hurt by it. I rise to make that request, and that is all I have to say, Your Honor.

[fol. 637] Mr. Crooker: With that prelude, Your Honor, we now want to file simultaneously the joint motion of appeal and joint motion for bail pending appeal, each being filed in duplicate and triplicate copies of each are now handed to the United States District Attorney in Court.

The Court: Are any of those subject to written answer being filed, Mr. Hartman?

Mr. Hartman: I have not seen them, Your Honor.

The Court: I will adjourn about an hour and let you do it if there are any. You look them over and let us know.

Mr. Hartman: All right, sir.

Your Honor, on this motion for bail pending appeal, the Government doesn't object to establishing bail for the defendants, but we do not in making our statement waive our contention that the appeal is frivolous and is made only for the purposes of delay.

Mr. Crooker: We are stating to the Court we desire the supersedeas as to the fine, too, in view of the fact that

in the other motion we filed which is already overruled, says we are ready and willing to pay the fine. I have outlined that.

The Court: Do you desire to file any written pleadings? [fol. 638] Mr. Hartman: Well, Your Honor, I don't see any purpose that we could accomplish by it.

The Court: In the event—what about the supersedeas rather than the payment of the fine? We have overruled it as far as Mr. Lott is concerned.

Mr. Hartman: We take the same position here. We insist on the payment of the fine. I have in connection with criminal cases have had occasion in the past to prepare orders for the Clerk ordering the Clerk to refund the money. I do not understand this suit here in this case undoubtedly is against some agency for repayment of the fine.

Mr. Moss: No, it was in the original Court where the sentence was passed.

Mr. Hartman: We would object to it.

The Court: Very well, I have the motion for bail and oral motion you might say for supersedeas and of course the motion is filed simultaneously; the notice of appeal is filed. There isn't a formal written motion for me not to enforce the payment of the fine at this time.

Mr. Crooker: Your Honor, I believe—let me be as frank as I know how. I believe the motion for bail pending appeal, [fol. 639] I believe it is broad enough to cover—now, I would like to look at it again and ask—I have just looked at Rule 46. I looked at it in my office. Mr. Schwartz's book is here. It just says bail pending appeal can be allowed by the trial Court or the Appellate Court. It doesn't—under such conditions are not going to accept the bail that we will appeal for confinement if it is overruled. I assume if we file a supersedeas we have got the right to do it under Rule 46 of the Rules. It doesn't say anything about supersedeas, but that is the type of bail we propose to file here, Your Honor.

May I ask, I guess everybody here knows but me, has the Judge approved the bail?

Mr. Moss: Would the Court permit me to confer with Mr. Costa a minute?

The Court: Certainly.

Mr. Crooker: Judge, I think Mr. Schwartz has probably found the Rule here. It is 38, Rule 38(a) (3).

The Court: I have a motion here for appeal and a motion for bail has been filed. What is your situation, Mr. Hartman?

Mr. Hartman: Well, are you asking me for any motions that I have or my answers to any of his motions?

[fol. 640] The Court: Answering the question as to bail, whether in the case of Mr. Lott he made a specific motion which I overruled.

Mr. Hartman: Well, sir, we feel these two defendants here should be ordered to pay the fine imposed by the Court and that that not be granted, and then we would move that the defendants be ordered to deposit the amount of the fine with the Clerk of the Court.

So far as the defendants making bail pending the appeal, we do not object, Your Honor, to the bail, but we do not waive our contention that the appeal is frivolous and made only for delay.

The Court: Well, if there is a motion implied or otherwise for delay in payment of the fine, that is overruled.

The motion to grant bail in the amount that now is $5,000 in each instance. Even as I said the other day, in Mr. Lott's case, I feel that this appeal is frivolous and I feel that it is not well taken and it is for the purposes of delay. However, there is a school of thought to the effect that the main idea is to keep the defendant from fleeing the jurisdiction and not ultimately carrying out the judgment of the Court. There is no suspicion in my mind in that situation. I will grant that and allow the bail in the sum of $5,000 each, as to each defendant, but not to the supersedeas in the payment of the fine.

Mr. Crooker: Your Honor, I am not quibbling about this, but here is our situation and I am sure Your Honor will understand it.

[fol. 641] While interest in money is all right and all that sort of thing, I am not going to bother the Court with that. I don't want and I don't believe Your Honor wants us to pay that $20,000 and in the event this bad indictment, the invalidity of it is sustained on appeal,—and I have got lots more confidence than the other fellows have in it—

The Court: Confidence in the invalidity?

Mr. Crooker: In the invalidity of the indictment. I don't want and I don't believe Your Honor wants us to pay that $20,000 and lose it. Could we do this, could we get a cashier's check—

The Court: I expect that is something between you and the Clerk.

Mr. Crooker: Both Rules say it is under such terms and conditions as the Court may impose. Could we get a check from a bank, a sizable bank that isn't going into any trouble, presumably, and deposit it payable to them or indorsed to the Clerk or something, and leave it in the custody of the Clerk.

Now, Rule 38 upon which they call the attention says in the custody, not payment of the fine, into the Government. It looks to me under these cases when you get it into the Treasury you can't get it back under whatever circumstances there may be.

Now, would Your Honor consider and let us find out from Mr. Thomas in the meantime what he does with it? Could [fol. 642] he hold that cashier's check by some bank pending the appeal, and I think it is permissible under the rules if Your Honor imposes that condition on us, we will deposit it. What I am doing is begging.

The Court: I think a provision which—it is sufficiently clear to my mind at least that in the event of the finding that they made a defective indictment that you could get your money back.

Mr. Crooker: The United States Supreme Court said no Court has got the power to make any such record.

The Court: Counsel, that was before the adoption of Federal Rules of Criminal Procedure.

Mr. Crooker: That may be a perfectly good answer, but I don't want to get beat out of $40,000, Judge.

The Court: If there is anything further, I will be available off and on until the 17th day of August, then I am leaving the jurisdiction.

Court will stand adjourned under the Rules.

[fol. 643] Appearance Bond on Appeal of Lee Blocker;

Appearance Bond on Appeal of Lorn D. Frazier;

Appearance Bond on Appeal of H. A. Lott;

Cost Bond on Appeal for Lee Blocker and Lorn D. Frazier, jointly;

Omitted from the printed record pursuant to the designations of counsel as to printing record heretofore copied at pages 1 & 7.

* * * * * * *

IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS ON APPEAL—Filed 5 day of August 1959

A concise statement of the points on which defendants Lee Blocker and Lorn D. Frazier intend to rely on appeal is as follows:

1.

The Government's whole course of conduct in this case showed clearly that its real purpose was to conceal from—rather than to reveal to—these defendants the essential elements of the offenses with which they were purportedly charged. This being a denial of their rights under the Sixth Amendment, the indictment is fatally defective and cannot [fol. 644] support the conviction and the prison terms imposed on defendants.

2.

The sufficiency of the indictment in this case must be viewed from the standpoint of the whole course of conduct of the Government's Internal Revenue Agents and other prosecutors; and since the record fairly teems with evidence of their following a course of secreting from defendants any and all information as to the essential elements of the offenses with which they were purportedly charged, the indictment is fatally defective.

3.

The indictment is fatally defective in all its counts since it wholly fails to apprise the defendants of the elements of any offense with which they were purportedly charged.

4.

The indictment is fatally defective in all its counts since each count is so vague, indefinite and uncertain that it fails to charge a violation of law, and it does not enable the defendants to know the nature and character of the attempted charge, to make defense thereto or to plead a judgment of acquittal or conviction in bar of further prosecution for the offenses attempted to be charged.

5.

The indictment is fatally defective in all its counts because each count is duplicitous in that in each count the [fol. 645] Government attempts to allege several different offenses.

6.

The indictment is fatally defective in all its counts because each count fails to allege how or in what manner the alleged acts of Lee Blocker and Lorn D. Frazier caused or could have caused any federal income tax deficiency.

7.

The indictment is fatally defective in all its counts because each count fails to allege how or in what manner Lee Blocker and Lorn D. Frazier knew or should have known that acts allegedly done by them resulted or would result in defeating any federal income taxes due.

By Joe S. Moss, By John H. Crooker, Attorney for defendants Lee Blocker and Lorn D. Frazier, Bank of the Southwest Building, Houston 2, Texas.

Certificate of Service (omitted in printing).

[fol. 646]

IN UNITED STATES DISTRICT COURT

CONCISE STATEMENT OF POINTS TO BE RELIED UPON BY DEFENDANT H. A. LOTT ON APPEAL—Filed 11 day of August, 1959

Defendant H. A. Lott intends to rely upon the following points in his appeal of this case:

I.

The indictment does not state facts sufficient to constitute an offense against the United States.

II.

The indictment is fatally defective in all of its counts because each count is duplicitous in that in each count the government attempts to allege several different offenses.

III.

Counts 1 through 5 of the indictment are each insufficient as a matter of law to charge an offense against the United States because these counts fail to form a basis for a plea of double jeopardy as to any one or all of them.

IV.

The indictment is fatally defective in all of its counts since it wholly fails to apprise defendant H. A. Lott of the [fol. 647] elements of any offense with which he was charged.

V.

The indictment fails to charge in any one or all of its counts an offense against the United States with the degree of certainty demanded in a criminal case since each count is so indefinite, vague and uncertain that it does not enable the defendant H. A. Lott to know the nature and cause of the crime charged and fails to inform him of the nature of the accusation in order that he could make a defense thereto.

VI.

The indictment is fatally defective in all of its counts because each count fails to allege how or in what manner the acts of H. A. Lott caused or could have caused any deficiency in the federal income taxes due the government by Farnsworth & Chambers Co., Inc.

VII.

The indictment is fatally defective in all of its counts because each count fails to allege how or in what manner H. A. Lott knew or could have known that the acts allegedly done by him resulted or would have resulted in defeating any federal income tax due the federal government by Farnsworth & Chambers Co., Inc.

[fol. 648]

VIII.

The conspiracy count is insufficient as a matter of law because it does not expressly allege a conspiracy agreement, if any.

IX.

The federal government's conduct in this case clearly establishes the fact that the government did not want to disclose to defendant H. A. Lott the necessary elements of the crimes with which he was charged but deliberately withheld from him the facts necessary to make a defense. Since this abridged H. A. Lott's right under the Sixth Amendment, the indictment is fatally defective and cannot support the conviction and sentence imposed on defendant H. A. Lott.

X.

Under the circumstances of this case the sentence imposed on H. A. Lott is excessive.

Denman Moody, W. V. Ballew, Jr., Attorneys for Defendant H. A. Lott, 16th Flr., Esperson Building, Houston 2, Texas.

Of Counsel: Baker, Botts, Andrews & Shepherd, 16th Flr., Esperson Building, Houston 2, Texas.

[fol. 649] Copies of the foregoing Statement of Points on Appeal have been served in accordance with law upon counsel for the United States of America and counsel for Messrs. Lee Blocker and Lorn D. Frazier.

Denman Moody, Attorney for Defendant H. A. Lott,
16th Flr., Esperson Building, Houston 2, Texas.

Order Extending Time for Filing of Record on Appeal;

Cost Bond on Appeal for H. A. Lott;

Clerk's Certificate;

Omitted from the printed record pursuant to the designations of counsel as to printing record heretofore copied at pages 1 & 7.

* * * * * * *

[fol. 653]

No. 17,888

IN UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

H. A. LOTT, LEE BLOCKER and LORN D. FRAZIER, Appellants,

v.

UNITED STATES OF AMERICA, Appellee.

MOTION TO DISMISS APPEAL—Filed February 26, 1960

Comes Now the United States of America, Appellee in the above-styled and numbered case now pending on the docket of this Court, acting herein by and through William B. Butler, United States Attorney for the Southern District of Texas, and pursuant to Rule 39(a), Federal Rules of Criminal Procedure, moves the Court to dismiss the appeal of the Appellants, H. A. Lott, Lee Blocker and Lorn D. Frazier. As grounds for this motion Appellee shows to the Court that, as the Record on file in this case establishes:

[fol. 654]

I.

This Court does not have jurisdiction of this appeal because the notices of appeal filed by each of the said Appellants were not filed within ten days after the entry of the respective judgments appealed from, as required by Rule 37(a)(2) F.R.Cr.P.

II.

The motions in arrest of judgment filed by Appellants did not have the effect of enlarging the time to file notice of appeal because, although they were filed within 10 days of the entry of the judgment, they were not filed within 5 days after the determination of guilt as required by Rule 34 F.R.Cr.P.

Wherefore, Appellee prays the Court to dismiss this appeal.

William B. Butler, United States Attorney; Fred L. Hartman, Asst. United States Attorney; Myron M. Sheinfeld, Asst. United States Attorney.

[fol. 669]

No. 17,888

In United States Court of Appeals

Fifth Circuit

H. A. Lott, Lee Blocker and Lorn D. Frazier, Appellants,

v.

The United States of America, Appellee.

Appeal From the United States District Court
For the Southern District of Texas

— —

ANSWER OF H. A. LOTT TO GOVERNMENT'S MOTION TO DISMISS APPEAL AND BRIEF IN SUPPORT THEREOF—Filed March 9, 1960

Comes Now H. A. Lott, one of the Appellants in the above entitled and numbered cause, and in answer to the Government's motion to dismiss this appeal, would respectfully show unto the Court as follows:

I.

This Court is not deprived of its jurisdiction over this appeal merely because Lott did not file his motion in arrest of judgment within 5 days of the date upon which the District Court announced its acceptance of Lott's plea of *nolo contendere*. Notwithstanding the Government's novel interpretation of Rule 34 of the Federal Rules of Criminal Procedure, the record clearly reflects that:

1. Sentence was pronounced on June 19, 1959 (R. 551), [fol. 670] and judgment and commitment were entered and filed of record on June 22, 1959 (R. 555).

2. Within five days (on June 23, 1959) Lott's motion in arrest of judgment was filed of record (R. 559).

3. Lott's motion in arrest of judgment was denied by the District Court on July 13, 1959 (R. 569).

4. Within ten days (on July 15, 1959) Lott filed notice of appeal (R. 572-74).

Lott says the foregoing established full and complete compliance with Rules 34 and 37(a)(2) of the Federal Rules of Criminal Procedure, and further satisfied the jurisdictional prerequisites for maintenance of his appeal.

Wherefore, premises considered, Lott respectfully prays the Court to deny Government's motion to dismiss this appeal.

Denman Moody, W. V. Ballew, Jr., Walter E. Workman, Attorneys for H. A. Lott, Appellant.

Of Counsel: Baker, Botts, Andrews & Shepherd, 1600 Esperson Building, Houston 2, Texas.

[fol. 680]

No. 17,888

IN UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

H. A. LOTT, LEE BLOCKER and LORN D. FRAZIER, Appellants,

v.

THE UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court
For the Southern District of Texas

ANSWER OF LEE BLOCKER AND LORN D. FRAZIER TO MOTION TO DISMISS APPEAL—Filed March 11, 1960

Come Now Lee Blocker and Lorn D. Frazier, appellants in the above cause, and in answer to appellee's motion to dismiss the appeal state as follows:

I.

This Court has jurisdiction of this appeal because the notice of appeal filed by appellants was filed within the time prescribed by Rule 37(a)(2), Federal Rules of Criminal Procedure.

II.

By the explicit terms of Rule 37(a)(2), the time to file notice of appeal did not expire until 10 days after entry of the order denying the motion to arrest judgment filed by appellants, whether or not the motion was timely filed under Rule 34, since the motion was filed within the 10 days following entry of judgment.

[fol. 681]

III.

The motion to arrest judgment filed by appellants was timely filed under Rule 34, Federal Rules of Criminal Procedure, since it was filed within 5 days after the "determination of guilt" as provided in Rule 34.

IV.

In the alternative, if the Court should hold that the motion to arrest judgment was not effective as such, it should be construed as a motion to the District Court under Rule 12(b)(2), Federal Rules of Criminal Procedure, to notice the failure of the indictment to charge an offense and lack of jurisdiction, and the appeal should be regarded as having been taken from the denial of such motion.

V.

In the further alternative, if the Court should hold that the motion to arrest judgment was not effective as such, it should be construed as a motion to vacate sentences under 28 U.S.C. §2255, and the appeal should be regarded as having been taken from the denial of such motion.

Wherefore, appellants Lee Blocker and Lorn D. Frazier pray the Court to deny the motion to dismiss this appeal.

Joe S. Moss, C. W. Wellen, William M. Ryan, John H. Crooker, Attorneys for Appellants.

[fol. 695]

IN UNITED STATES COURT OF APPEALS

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—March 16, 1960 (omitted in printing)

[fol. 696]

IN UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 17888

H. A. LOTT, LEE BLOCKER and LORN D. FRAZIER, Appellants,

versus

UNITED STATES OF AMERICA, Appellee.

Appeals from the United States District Court
For the Southern District of Texas

OPINION—June 20, 1960

Before Cameron and Jones, Circuit Judges, and Wright, District Judge.

Jones, Circuit Judge: The three appellants and two others were charged, in the first count of a five-count indictment, with attempting to evade and defeat income taxes of a named corporation for the year 1951. Three other counts charged the same offense for each of the years 1952, 1953 and 1954. A fifth count of the indictment charged a con-
[fol. 697] spiracy to evade and defeat the corporation's income tax for the years 1951 to 1954, inclusive. The appellants, two of them on March 17, 1959, and the third on March 20, 1959, by leave of court, withdrew pleas of not guilty and tendered pleas of nolo contendere. These pleas were accepted by the court. Sentencing was deferred. During the period of deferment the judge, who had permitted the filing of and had accepted the nolo contendere pleas, presided over the trial of the two others who had been jointly indicted with the appellants. At this trial one of those tried was acquitted and the jury was unable to agree upon a verdict as to the other. Thereafter, on June 19, 1959,

the court, with the same judge presiding, called the appellants before him for sentencing. The appellant Blocker was sentenced to three years imprisonment. The appellants Frazier and Lott were each sentenced to two years imprisonment. A fine of $20,000 was imposed upon each appellant. The sentences were pronounced from the bench on June 19, 1959, and the formal written judgments were filed on June 22, 1959. On the following day, June 23, 1959, motions in arrest of judgment were filed by each appellant. These motions were denied on July 13, 1959. The appellant Lott filed notice of appeal on July 15, 1959, and the appellants Blocker and Frazier filed notice of appeal on July 17, 1959.

Although stated in different language, the claims of error made by the appellant Lott and those of the appellants Blocker and Frazier are substantially the same. It is contended that the indictments are insufficient: that the court was without jurisdiction to impose sentences on the pleas [fol. 698] of nolo contendere after hearing the evidence adduced at the trial of the others who were jointly indicted; and that the sentences were beyond the jurisdiction of the court. These questions going to the merits are not reached.

The United States has moved to dismiss the appeals on the ground that the notices of appeal were not filed within ten days after the entry of the judgments appealed from as required by Rule 37(a)(2), Fed. Rules Crim. Proc. 18 U.S.C.A.; and that the motions in arrest of judgment did not enlarge the time for giving notice of appeal because, although filed within ten days of the entry of the judgment, the motions were not filed within five days after the determination of guilt as required by Rule 34, Fed. Rules Crim. Proc. 18 U.S.C.A. The appellants suggest that because the Government has designated portions of the record to be brought up on appeal and has filed a brief on the merits its motion to dismiss ought not be entertained. But lack of jurisdiction can be raised at any time and the court is under a duty to notice absence of jurisdiction even though it is not raised by a party. Rule 12(b)(2) Fed. Rules Crim. Proc. 18 U.S.C.A.

The appellants are insistent that under Rule 37(a)(2)[1] an appeal may be taken within ten days after the entry of an order denying a motion in arrest of judgment if such [fol. 699] motion was filed within ten days after judgment even though the motion in arrest of judgment was filed out of time and the notice of appeal was not filed until more than ten days had elapsed after judgment. This, the appellants say, is the clear, explicit and unambiguous meaning of Rule 37(a)(2) notwithstanding the provision of Rule 34[2] requiring the filing of a motion in arrest of judgment within five days after determination of guilt. Support for the appellants' position is found in *Lujan* v. *United States*, 10th Cir. 1953, 204 F. 2d 171, where the proposition for which appellants contend is adopted and applied. In the Lujan case the motion was for a new trial under Rule 33 Fed. Rules Crim. Proc. 18 U.S.C.A. rather than a motion for arrest of judgment such as is before us. We do not think this difference would call for a distinction.

The doctrine of Lujan was expressly rejected in *United States* v. *Berlone*, 3rd Cir. 1957, 249 F. 2d 156. There the defendant was convicted on March 28, 1957, sentenced in open court on April 12, 1957, and a judgment of sentence and commitment was entered on April 18, 1957. On April 22, 1957, the defendant filed motions for a new trial and in arrest of judgment. On August 9, 1957, an order was entered denying the motions. On August 19, 1957, the defendant gave notice of appeal from the judgment and sentence of April 18, 1957, and from the August 19, 1957, order. [fol. 700] The motions were filed within ten days after the entry of the judgment as is the case here. The appeal was

[1] An appeal by a defendant may be taken within ten days after entry of the judgment or order appealed from, but if a motion for new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. Rule 37(a)(2) Fed. Rules Crim. Proc. 18 U.S.C.A.

[2] The court shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the court may fix during the 5-day period. Rule 34, Fed. Rules Crim. Proc. 18 U.S.C.A.

taken within ten days after the entry of the order denying the motions as is the case here. The motions were not timely filed as was the case in Lujan, and as is the case here unless, of course, the entry of the pleas of nolo contendere did not result in determinations of guilt within the meaning of Rule 34. In the Bertone case it was held that the appeal was not taken in time. The same conclusion, upon a similar factual situation, was reached in *Marion* v. *United States*, 9th Cir. 1948, 171 F. 2d 185, cert. den. 337 U. S. 944, 69 S. Ct. 1500, 93 L. Ed. 1747.

We are in agreement with the Third Circuit that the rule announced in the Lujan case is unsound and ought not to be followed. To hold, as Lujan holds, that the untimely filing of a motion for a new trial or in arrest of judgment will toll the running of the time in which an appeal may be taken, although the motion could not be considered on its merits, produces a result which we think was not intended. It does not seem that the Supreme Court, in framing the rules, had the design of permitting a convicted defendant to file out of time a motion which the court could not have given him leave to file after the time for filing had expired, and so obtain an extension of the time for taking an appeal even though the court itself was powerless to grant such an extension.

[fol. 701] This Court has, heretofore considered the question and has adopted the rule announced in Bertone, citing that opinion with approval. This Court has succinctly stated the principle in this language:

> "To extend the time for taking an appeal, a motion for new trial must be both (a) timely made under Rule 33 and (b) made within ten days after entry of the judgment of conviction under Rule 37(a)(2)." *O'Neal* v. *United States*, 5th Cir. 1959, 264 F. 2d 809. Cf. *Massicot* v. *United States*, 5th Cir. 1958, 254 F. 2d 58.

When an act is required or allowed to be done at or within a specified time the court for cause shown may . . . order the period enlarged . . . or . . . permit the act to be done after the expiration of the specified period . . . but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal. Rule 45(b), Fed. Rules Crim. Proc. 18 U.S.C.A.

If the pleas of nolo contendere and the acceptance of them were determinations of guilt it follows that the motions in arrest of judgment were filed too late, the time for appeal was not tolled, and the appeals were not taken in time. If, on the other hand there was no determination of guilt, as that phrase is used in Rule 34, until the judgment and sentence, then the motions were timely made and the appeals were timely taken.

After a jury trial a determination of guilt has been made when a verdict of guilty has been returned by the jury and accepted by the court. *Brown* v. *United States*, 9th Cir. 1952, 198 F. 2d 999; *Finn* v. *United States*, 4th Cir. 1958, 256 F. 2d 304. A determination of guilt has been made when a plea of guilty has been entered. *Marteney* v. *United States*, 10th Cir. 1954, 216 F. 2d 760. The appellants urge that a plea of nolo contendere is a plea in avoidance without a confession and that it does not result in a determination of guilt. It is, so appellants say, only an implied confession [fol. 702] of guilt, a mere statement of unwillingness to contest, and no more. The federal courts, however, have long held that the legal effect of a plea of nolo contendere is the same as a plea of guilty for all purposes so far as regards proceedings on the indictment. *United States* v. *Hartwell*, Cir. Ct. Mass. 1869, 3 Cliff. 221, 26 Fed. Cas. 196. A leading case is *United States* v. *Lair*, 8th Cir. 1912, 195 F. 47, where it is said:

> "In fact, the defendant admitted that he committed the offense charged within that district; for his plea of nolo contendere is in effect a plea of guilty to every essential element of the offense well pleaded in the charge against him, and warrants his conviction thereof without more." 195 F. 47, 52.

On the question of guilt or innocence, the Supreme Court has held that the plea of nolo contendere is as conclusive as a plea of guilty would have been, and after such a plea nothing is left but to render judgment. *United States* v. *Norris*, 281 U. S. 619, 50 S. Ct. 922, 74 L. Ed. 1076. See also *Hudson* v. *United States*, 272 U. S. 451, 47 S. Ct. 127, 71 L. Ed. 347; *United States* v. *Frankfort Distillers*, 324 U. S.

293, 65 S. Ct. 661, 89 L. Ed. 951. The well settled principle that, for the purposes of the case, the plea of nolo contendere is the equivalent of a plea of guilty has been recognized and applied by this Court. *Farnsworth* v. *Zerbst*, 5th Cir. 1938, 97 F. 2d 255. Cf. *Piassick* v. *United States*, 5th Cir. 1958, 253 F. 2d 658; *Mickler* v. *Fahs*, 5th Cir. 1957, 243 F. 2d 515. The state courts, generally, are in accord. Annot. 152 A.L.R. 253; 4 Wharton Criminal Law and Procedure [fol. 703] 772, § 1903; Lenvin and Myers, Nolo Contendere: Its Nature and Implications, 51 Yale Law J. 1255. The rule being as it is, it follows that the determination of guilt of the appellants was made when their pleas of nolo contendere were tendered to and accepted by the court.

However may be the law as to when, in the usual case, there is a determination of guilt for the measuring of the time for filing a Rule 34 motion, the appellants say that there was not, in fact, any determination of guilt at the time of the pleas. That determination, say the appellants, was not made until after the trial of the other defendants and the determination of guilt was made by the court, and was based upon the evidence heard by the court at the trial rather than upon the pleas of nolo contendere. Upon this theory the time within which the motions in arrest of judgment could be filed would begin at the time the sentences were imposed. In considering the contention of the appellants that they were sentenced upon a determination of guilt based upon the evidence at the trial of the other defendants rather than upon their pleas of nolo contendere, a look at the record becomes desirable. What happened is this: during the proceedings for sentencing the court heard statements of counsel for the appellants seeking mitigation of punishment. In these statements references were frequent to matters which transpired at the trial of the other defendants. It was brought out that counsel for the appellants had a representative at the trial, taking notes, and reporting to counsel so that they knew, in the words of one of the attorneys "exactly what was testified, in substance." Two of [fol. 704] the three appellants made statements on behalf of themselves. Character witnesses numbering five, seven, and five, for the respective appellants, testified. At the conclusion of the hearing the court stated, "I have found each

guilty of the felonies as contained in the grand jury indictment." Then followed an oral pronouncement by the court of the sentences. This hearing was on June 19, 1959. On June 22, 1959, the court entered, as to each appellant, a formal judgment and commitment. From them we quote:

> "It is adjudged that the defendant has been convicted upon his plea of nolo contendere of the offense of . . . and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,
>
> "It is adjudged that the defendant is guilty as charged and convicted."

We need not consider whether the judgment was the oral pronouncement of sentence or the formal writing. Cf. *Pollard* v. *United States*, 352 U. S. 354, 77 S. Ct. 481, 1 L. Ed. 2d 393; *United States* v. *Hark*, 320 U. S. 531, 64 S. Ct. 359, 88 L. Ed. 290; *Patterson* v. *United States*, 5th Cir. 1950, 183 F. 2d 687; *Spriggs* v. *United States*, 9th Cir. 1955, 225 F. 2d 865. In neither the oral sentence nor the formal judgment does it appear that the determination of guilt is based upon the trial of the other defendants. Any such conclusion is negatived by recital in the formal judgment that "the defendant has been convicted upon his plea of nolo contendere." We see no merit in this contention of the appellants.

[fol. 705] We can find no principle that would sustain the appellants in their contention that they have given and filed a notice of appeal from the judgments of conviction and sentence within the time prescribed by the applicable rule.

The appellants ask that we treat the notices of appeal as being from the order denying the motions in arrest of judgment in the event we hold that there were no timely notices given of appeals from the judgments of conviction and sentence. An order overruling a motion in arrest of judgment is, it seems, an appealable order. *Sutton* v. *United States*, 5th Cir. 1946, 157 F. 2d 661. The difficulty with the appellants' proposal is that, since the motion was not timely filed, the district court had no jurisdiction of the motion

and all that this Court could do would be to direct that the order denying the motion be affirmed for want of jurisdiction. Such an ineffectual result need not be further considered.

It is contended by the appellants that if their appeal from the judgment was not taken in time, we should treat the motion in arrest of judgment as a motion to vacate the sentence under 28 U.S.C.A. § 2255, and then treat the notice of appeal as being directed to the court's order as denying Section 2255 relief. The Tenth Circuit, in a case where a motion in arrest of judgment was filed too late, treated the motion as one to vacate. In its opinion it was said:

> "The 'motions in arrest of judgment', having been filed more than five days after determination of guilt, were untimely under Rule 34 of the Federal Rules of [fol. 706] Criminal Procedure, 18 U.S.C.A., and the government takes the preliminary position that the trial court was without authority to treat the pleadings as motions to vacate under Section 2255 for the purpose of considering the legal questions raised by the motions. Section 2255 specifically authorizes 'A prisoner in custody under sentence of a court * * * claiming * * * that the court was without jurisdiction to impose such sentence * * * may move the court which imposed the sentence to vacate, set aside or correct the sentence * * * at any time.' Treated as motions to vacate, the pleadings were undoubtedly timely to challenge the legal sufficiency of the counts in the indictment to state a federal offense. Having in mind that it is the content of the pleadings and not the label which determines their nature and effect, we can see no impropriety in the court's treatment of the pleadings as motions to vacate under Section 2255." 216 F. 2d 760, 762.

The Fourth Circuit adopted the doctrine in *Finn* v. *United States*, 4th Cir. 1958, 256 F. 2d 304, and used it as a means for reaching the merits of the question presented by the motion and the ruling upon it.

The appellants are not presently in confinement and recognize that 2255 relief is not available to anyone who is not

in custody under sentence of a court. *Heflin* v. *United States*, 358 U. S. 415, 79 S. Ct. 451, 3 L. Ed. 2d 407. They would have us surmount this barrier by following the pronouncement of the Ninth Circuit in *Black* v. *United States*, 9th Cir. 1959, 269 F. 2d 38, cert. den. 361 U. S. 938, 80 S. Ct. 209, 4 L. Ed. 2d 357. Black had attempted to take an appeal [fol. 707] and, under Rule 38(a)(2), had elected not to begin serving his sentence. The appeal was filed out of time. He later filed a Section 2255 motion and attempted, though not in custody, to appeal from an order denying relief. It was held that since the 2255 motion cannot be maintained while there is a pending appeal in good standing, the appeal was deemed abandoned by the filing of the 2255 motion. Since Black would be entitled to freedom from custody only if he had an appeal pending from his conviction and sentence, he was regarded as being in technical custody after the filing of his 2255 motion for the purpose of conferring 2255 jurisdiction. In this case, the appellants assert, they should be regarded as being in technical custody for the purpose of allowing jurisdiction over their Rule 34 motions which they would have us treat as being made under Section 2255. It might be observed that, when the Rule 34 motions were filed, the time for appeal had not run and the appellants could not claim that they were then in technical, any more than actual, custody.

We have mapped but a part of the tortuous road over which the appellants would lead us in seeking to sustain our jurisdiction to review this case. In going with them as far as the foregoing outline would take us, it would be necessary to hold that the Rule 34 motions were not Rule 34 motions at all but, in effect, Section 2255 motions; and that the appellants, although not in custody in any real sense,[1] [fol. 708] are in technical custody so as to permit the court to entertain the mislabeled 2255 motion. But could we travel with appellants thus far we would then become confronted with the question as to whether we may treat the notices of appeal as being from the order denying the Rule 34 motions treated as Section 2255 motions. The notices of appeal pur-

[1] The notices of appeal state that the appellants are at liberty on bail.

port to be only from the judgments and sentences. We do not have in the notices of appeal an inclusion of the orders on the motions as was the case in *Martency* v. *United States*, *supra*. Although it is provided that a court shall not be required to entertain a second or successive motion under Section 2255, it may, in its discretion, do so. *Wells* v. *United States*, 5th Cir. 1954, 210 F. 2d 112.

To remove any question as to whether a 2255 motion might be filed and to avoid circuity of actions in resolving the questions, it might be well to review, to the extent permissible, the questions which the appellants assign as error. In the case of *Heflin* v. *United States*, *supra*, the Supreme Court treated a motion under Section 2255 as a motion under Rule 35, Fed. Rules Crim. Proc. 18 U.S.C.A., and held that although there was no timely application for certiorari to review an order on a Rule 35 motion, the Supreme Court would, in order to avoid a circuity of actions, dispense with the requirements of its Rule 22(2). But we are not authorized to dispense with the rules that govern our jurisdiction. On the contrary, we are expressly prohibited from extending the time for taking appeals. Rule 45(b) Fed. Rules Crim. Proc. 18 U.S.C.A. So also the Rules require that the notice of appeal shall set forth, among other [fol. 709] things, "a concise statement of the judgment or order, giving its date, and any sentence imposed." Rule 37(a)(1), Fed. Rules Crim. Proc. 18 U.S.C.A. We cannot treat an express reference in the notice of appeal to a judgment and sentence of a specified date as evidencing an appeal from an order upon a motion subsequently filed, no matter how the motion may be treated. Cf. *Martin* v. *United States*, 10th Cir. 1959, 263 F. 2d 516; *Jacobanis* v. *United States*, 1st Cir. 1958, 256 F. 2d 485.

We reach, finally, the conclusion that the jurisdiction of this Court has not been invoked by timely notices of appeal. So concluding we dismiss the appeals without consideration of the other questions which the appellants have asked us to decide. It would not be appropriate to suggest whether, and if so how, those questions may be hereafter raised.

The appeals are

Dismissed.

CAMERON, Circuit Judge, Dissenting.

[fol. 710]

IN UNITED STATES COURT OF APPEALS

No. 17888

H. A. LOTT, LEE BLOCKER and LORN D. FRAZIER,

versus

UNITED STATES OF AMERICA.

JUDGMENT—June 20, 1960

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and on the motion filed by appellee on February 26, 1960 to dismiss the appeals, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the appeals in this cause be, and the same are hereby, dismissed.

"Cameron, Circuit Judge, Dissenting."

[fol. 714]

IN UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 17,888

H. A. LOTT, LEE BLOCKER and LORN D. FRAZIER, Appellants,

versus

UNITED STATES OF AMERICA, Appellee.

ORDER STAYING MANDATE—Filed July 13th, 1960

On Consideration of the Application of the appellants in the above numbered and entitled cause for a stay of the

mandate of this Court therein, to enable appellants to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It Is Ordered that the issue of the mandate of this Court in said cause be and the same is stayed for a period of thirty days from June 20, 1960; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from June 20, 1960 there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from June 20, 1960, unless the above-mentioned certificate shall be filed with the Clerk of this Court within that time.

Warren L. Jones, United States Circuit Judge.

[fol. 715]

UNITED STATES OF AMERICA

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

CLERK'S CERTIFICATE

I, Edward W. Wadsworth, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 650 to 714, next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 17888, wherein H. A. Lott, Lee Blocker and Lorn D. Frazier, are Appellants, and United States of America is Appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record, numbered from 1 to 649, are identical with the printed

record upon which said cause was heard and decided in the said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Court of Appeals at my office in the City of New Orleans, Louisiana, in the Fifth Circuit this 13th day of July, A. D., 1960.

Edward W. Wadsworth, Clerk, United States Court of Appeals for the Fifth Circuit; By Clara R. James, Chief Deputy Clerk.

[Seal]

[fol. 716]

SUPREME COURT OF THE UNITED STATES

No. 238, October Term, 1960

H. A. LOTT, et al., Petitioners,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—October 10, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

E COPY

No. 258

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

H. A. LOTT, LEE BLOCKER AND LORN D. FRAZIER,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. .....

In The

Supreme Court of the United States

October Term, 1960

H. A. Lott, Lee Blocker and Lorn D. Frazier,
Petitioners,

v.

The United States of America,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, H. A. Lott, Lee Blocker and Lorn D. Frazier, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case (No. 17,888 below).

CITATION TO OPINION BELOW

The majority opinion of the Court of Appeals (R. 696-709), printed in Appendix B hereto, *infra*, p. 29, is reported at ..... F. 2d ..... The dissenting circuit judge below has not yet filed an opinion. The District Court did not render an opinion.[1]

[1] For convenience, the conflicting Tenth Circuit opinion in *Lujan v. United States*, relied upon as a basis for certiorari, is printed in Appendix C hereto, *infra*, p. 49.

JURISDICTION

The judgment of the court below (Cameron, C. J., dissenting), dismissing the appeals for want of jurisdiction, was dated and entered June 20, 1960 (R. 710; *infra*, p. 41). No petition for rehearing was filed with the Court of Appeals. Jurisdiction of this Court is invoked under 62 Stat. 928, 28 U.S.C. §1254 (1), and Supreme Court Rule 22(2).

QUESTIONS PRESENTED

The *primary question* forming the basis for this petition for certiorari is:

1. Whether a notice of appeal in a criminal case was timely filed under Rule 37(a)(2), Federal Rules of Criminal Procedure,[2] where:

   (a) The notice of appeal was filed within 10 days after entry of the order denying a motion in arrest of judgment.

   (b) The motion in arrest of judgment was filed within 5 days after entry of the judgment.

   (c) A plea of *nolo contendere* was accepted more than 5 days before the motion in arrest of judgment was filed.

The following additional questions presented go to the merits of the appeals — they were not passed upon by the Court of Appeals since it dismissed the appeals for want of jurisdiction:

2. Whether a short-form indictment purporting to charge *individuals* with attempting to evade *corporate* income taxes, and conspiracy to do so, is sufficient where:

---

[2] All references to Rules are to the Federal Rules of Criminal Procedure, unless otherwise stated.

(a) The indictment does not charge that there was a deficiency in the payment of income taxes by the corporation.

(b) The indictment does not charge that the accused had knowledge of any tax deficiency.

(c) The indictment does not charge that the accused filed the corporate tax returns.

(d) The indictment does not charge what part the accused individually had in the alleged attempt to evade corporate income taxes.

(e) The conspiracy count of the indictment does not charge all of the basic elements of the substantive offense of attempted evasion of corporate income taxes which is alleged to have been the object of the conspiracy.

3. Whether the District Court lost jurisdiction to convict Petitioners upon their pleas of *nolo contendere* and impose prison sentences where:

(a) After acceptance of the pleas of *nolo contendere* the District Court deferred sentencing and proceeded to hear a lengthy trial of other persons who were accused in the indictment.

(b) On the day of the sentencing of Petitioners the District Court obviously relied upon the testimony adduced at the trial of the other persons accused in the indictment.

4. Whether imposition of prison sentences for *felony offenses* (in excess of one year) was beyond the jurisdiction of the District Court where the written judgments adjudged that Petitioners were convicted of the *misdemeanor offenses* of "filing false and fraudulent corporate income tax returns" and "conspiring to file false and fraudulent corporate income tax returns."

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The provision *primarily relied upon* as the basis for requesting issuance of a writ of certiorari is Rule 37(a)(2), Federal Rules of Criminal Procedure, which provides in pertinent part as follows:

> "(2) **Time for Taking Appeal.** An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion . . . ."

Other provisions involved are U. S. Const. amends. V, VI; Int. Rev. Code of 1939, ch. 1, §§145(a), 145(b), 53 Stat. 62, as amended, 57 Stat. 144; Int. Rev. Code of 1954, ch. 75, §§7201, 7203, 7207, 68A Stat. 851, 853; Conspiracy Act, 62 Stat. 701, 18 U.S.C. §371; Act of June 25, 1948, 62 Stat. 967, as amended, 63 Stat. 105, 28 U.S.C. §2255; Fed. R. Crim. P. 2, 7(c), 11, 12(b)(2), 32, 34, 37(a)(2), 45(b). The foregoing constitutional provisions, statutes and rules are printed in Appendix A, *infra*, p. 19.

STATEMENT

The three Petitioners were convicted, fined and sentenced to imprisonment by the United States District Court for the Southern District of Texas, Houston Division, on the basis of a Federal grand jury indictment (R. 11-23) which purports to charge them, along with Richard A. Farnsworth, Sr., and Alan Farnsworth, in five counts. Counts 1 through 4 purport to charge a willful attempt to evade and defeat taxes of Farnsworth & Chambers Company, Inc. (a Texas corporation) for the years 1951 through 1954, in

violation of Section 145(b) of the Internal Revenue Code of 1939 (counts 1-3), and Section 7201 of the Internal Revenue Code of 1954 (count 4). Count 5 purports to charge a conspiracy to willfully attempt to evade and defeat taxes of Farnsworth & Chambers Company, Inc., for the same years, in violation of 18 U.S.C. §371. Petitioners were employee-officers and minor stockholders (approximately 7% among them) of the corporation (R. 111, 533).

Following return of the indictment, Petitioners were arraigned and pleaded "not guilty" (R. 24). They filed motions to dismiss the indictment (R. 62), for severance (R. 47), and for a bill of particulars (R. 24, 82), but these were denied (R. 347). Petitioners then asked to be rearraigned for the purpose of entering pleas of *nolo contendere* (R. 444, 466). Acceptance of the pleas was vigorously opposed by the Government (R. 444-446, 466), but they were accepted by the District Court. The pleas of *nolo contendere* were entered on March 17, 1959, by Petitioners Blocker and Frazier (R. 464), and on March 20, 1959, by Petitioner Lott (R. 483).

After accepting such pleas, the District Court deferred sentencing and presided at the trial of Richard A. Farnsworth, Sr., and Alan Farnsworth under the indictment. This jury trial commenced early in April, 1959, and lasted through 11 weeks. Alan Farnsworth was found not guilty on all counts, but the jury failed to reach a verdict as to Richard A. Farnsworth, Sr.

Following the frustrating efforts of the Government in the Farnsworth trial (which ended June 9, 1959), Petitioners were called before the District Court on June 19, 1959, for sentencing (R. 487). During the sentencing proceedings repeated reference was made to evidence adduced at the Farnsworth trial (R. 488, 525, 532, 550). Petitioners were orally sentenced to serve terms of imprisonment, 3 years in the case of Blocker and 2 years each in the cases of Lott and Frazier, and each of the three was fined

$20,000 (R. 551-552). The written judgments were filed on June 22, 1959; they adjudge Petitioners guilty of "filing false and fraudulent corporate income tax returns" and "conspiring to file false and fraudulent corporate income tax returns," although they refer to the statutes set out in the indictment (R. 553-559; *infra*, pp. 43-48).

On June 23, 1959, Petitioners Blocker and Frazier filed a motion denominated "motion in arrest of judgment," which prayed "that the judgment and sentences of movants be arrested and set aside and that the indictment against them be dismissed, and that movants be granted such other relief as may be required to serve the ends of justice" (R. 563-566). On the same day Petitioner Lott filed a "motion in arrest of judgment" praying for identical relief (R. 559-561). Orders denying the motions in arrest of judgment were entered on July 13, 1959 (R. 568, 569). Petitioner Lott filed notice of appeal to the Court of Appeals on July 15, 1959 (R. 572). Petitioners Blocker and Frazier filed notice of appeal on July 17, 1959 (R. 613). The Court of Appeals, one circuit judge dissenting, entered judgment dismissing the appeals for want of jurisdiction on June 20, 1960 (R. 710; *infra*, p. 41).

Since various dates are of critical importance in considering the decision of the Court of Appeals, they are set out below in chronological order:

March 17, 1959	Rearraignment and entry of *nolo contendere* pleas by Petitioners Blocker and Frazier (R. 464).
March 20, 1959	Rearraignment and entry of *nolo contendere* plea by Petitioner Lott (R. 483).
June 19, 1959	Sentencing of all Petitioners in open court (R. 487-553).
June 22, 1959	Judgment and commitment as to each Petitioner filed (R. 553-559).

June 23, 1959	Motions in arrest of judgment filed by all Petitioners (R. 559, 563).
July 13, 1959	Orders denying the motions in arrest of judgment of all Petitioners entered (R. 568, 569).
July 15, 1959	Notice of appeal filed by Petitioner Lott (R. 572).
July 17, 1959	Notice of appeal filed by Petitioners Blocker and Frazier (R. 613).

A divided Court of Appeals bench below dismissed the appeals upon the ground that its jurisdiction had not been invoked by timely notices of appeal (R. 696; *infra*, p. 29). The majority (composed of one of the circuit judges and the district judge on the bench hearing the case) held that the motions in arrest of judgment — *filed well within 5 days after entry of the judgments* —were not effective to toll the time for giving notice of appeal under Rule 37(a)(2) because such motions in arrest of judgment were not filed within 5 days *after entry of the nolo contendere pleas.* Acceptance of the *nolo contendere* pleas was construed to be a "determination of guilt" within the meaning of Rule 34.

REASONS FOR GRANTING THE WRIT

There are several compelling reasons why a review on writ of certiorari should be granted in this case:

1. The majority decision of the divided Court of Appeals in this case is in *direct and irreconcilable conflict* with decisions of the Court of Appeals for the Tenth Circuit.

2. The conflict concerns an extremely important question of federal criminal procedure and jurisdiction which should be settled by this Court.

3. The decision of the Court of Appeals in this case constitutes a strained interpretation of the Federal Rules

of Criminal Procedure which leads to illogical results — making Rule 37(a)(2) a virtual trap — and is believed to be erroneous.

4. Review on writ of certiorari is necessary in order that Petitioners will not be deprived of a review on the merits of convictions under an insufficient indictment — which were obtained in proceedings which departed from the accepted and usual course of criminal proceedings.

1. Conflict

The decision of the majority of the Court of Appeals bench below is in *direct conflict* with two decisions of the Court of Appeals for the Tenth Circuit, the first of which is *Lujan* v. *United States*, 204 F. 2d 171 (10 Cir. 1953), *infra*, p. 49. Existence of the conflict was expressly noted in the majority opinion below (*infra*, p. 32):

> ". . . Support for the appellants' position is found in *Lujan* v. *United States*, 10th Cir. 1953, 204 F. 2d 171, where the proposition for which appellants contend is adopted and applied. In the Lujan case the motion was for a new trial under Rule 33 Fed. Rules Crim. Proc. 18 U.S.C.A. rather than a motion for arrest of judgment such as is before us. We do not think this difference would call for a distinction."
>
> ". . .
>
> "We are in agreement with the Third Circuit that the rule announced in the Lujan case is unsound and ought not to be followed. . . ."

The Third Circuit decision referred to is *United States* v. *Bertone*, 249 F. 2d 156 (3 Cir. 1957), which is also in irreconcilable conflict with the Tenth Circuit decision in *Lujan*.

In the recent decision of *Smith* v. *United States*, 273 F. 2d 462 (10 Cir. Nov. 7, 1959), the Tenth Circuit took note of the conflict, but expressly reaffirmed its position. Indicating the

necessity for settlement by this Court of the disputed jurisdictional question here involved, the Tenth Circuit stated, 273 F. 2d at 465:

> ". . . It appears to us that the provisions of Rule 37(a)(2) are clear and unambiguous and can be changed only by the rule-making authority. . . ."

Indeed, this Supreme Court may have already decided this point in accordance with the two decisions of the Tenth Circuit and contrary to the decision of the Court of Appeals for the Fifth Circuit below. A factual situation identical in all material respects to that in the instant case was presented in *Sullivan* v. *United States*, 212 F. 2d 125 (10 Cir. 1954), *aff'd* 348 U.S. 170 (1954). The defendant entered a plea of *nolo contendere* on April 8, 1953, was sentenced on May 26, 1953, and filed a motion in arrest of judgment on May 29, 1953; the motion in arrest of judgment was denied after June 23, 1953, and within 10 days thereafter the notice of appeal was filed. Both the Court of Appeals and this Court exercised jurisdiction over the appeal. As the Court of Appeals stated in its opinion in this case, *infra*, p. 31, "[L]ack of jurisdiction can be raised at any time and the court is under a duty to notice absence of jurisdiction even though it is not raised by a party." It seems unreasonable to assume that in *Sullivan* both the Court of Appeals and this Supreme Court failed to notice absence of jurisdiction, even though it was not raised by a party. It seems much more reasonable to assume that jurisdiction was found by these courts to exist in *Sullivan* — in accordance with the "plain words" of Rule 37(a)(2). Cf., *United States* v. *Robinson*, 361 U.S. 220, 229 (Jan. 11, 1960).

The decision of *Marion* v. *United States*, 171 F. 2d 185 (9 Cir. 1948), *cert. den.* 337 U.S. 944, referred to in the opinion

below (*infra*, p. 32) is inapposite because there the motion was not filed within 10 days after entry of the judgment.[3]

2. Importance

It would be difficult to exaggerate the importance of the unsettled questions of federal criminal procedure here presented for review by this Court.

Manifestly, ascertainment of the time for filing notice of appeal is *of critical importance* in a criminal case. Indeed, the question arises in *nearly every such case* in which there is a conviction. In simple fairness, a defendant should be required only to read the rule entitled "Time for Taking Appeal" — Rule 37(a)(2) — in order to determine the amount of time he has in which to file his notice of appeal. Just as importantly, he should be able to depend upon what the rule plainly says. It is especially important that the

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[3] Petitioners' alternative position is that the motions in arrest of judgment should be viewed as motions to vacate the sentences under 28 U.S.C. §2255 (since they raised the insufficiency of the indictment to confer jurisdiction and also prayed that the sentences be set aside), and that the appeals should be regarded as having been taken from the denial of such motions. Recognizing the precedent for such treatment laid down by *Marteney* v. *United States*, 216 F. 2d 760 (10 Cir. 1954) — and apparently conceding its propriety *arguendo* — the Court of Appeals below held that the notices of appeal could not be treated as appeals from the denial of Section 2255 motions because the notices of appeal purport to be only from the judgments and sentences (*infra*, p. 40). This part of the decision represents a *severe conflict in principle* with the Fifth Circuit's own recent decision in *O'Neal* v. *United States*, 272 F. 2d 412 (5 Cir. Nov. 10, 1959), in which an appeal bond was held to constitute sufficient notice of appeal, as well as with other decisions of similar import. E.g., *Black* v. *United States*, 269 F. 2d 38 (9 Cir. 1959), *cert. den.* 361 U. S. 938, *Tillman* v. *United States*, 268 F. 2d 422 (5 Cir. 1959), and *Blunt* v. *United States*, 244 F. 2d 355 (D.C. Cir. 1957) — applications for leave to appeal in forma pauperis; *Jordan* v. *United States*, 233 F. 2d 362 (D.C. Cir. 1956), *rev'd mem. other grounds* 352 U.S. 904 (1956) — petition for writ of mandamus.

time for filing notice of appeal be made certain when it is remembered that many other matters must be considered immediately following the judgment: E.g., motions for new trial, motions in arrest of judgment, motions for suspension or reduction of sentence, applications for bail — in addition to the practical, non-legal problems which must be solved by one who is convicted.

That the question is of such importance as to warrant review is clearly indicated by the recent opinion in *United States* v. *Robinson*, 361 U.S. 220 (Jan. 11, 1960), involving a different question under Rule 37(a)(2), in which this Court stated, p. 222:

> ". . . Because of the importance of the question to the proper and uniform administration of the Federal Rules of Criminal Procedure, we granted certiorari. . . ."

The merits of the appeal, which were not reached by the Court of Appeals, also raise vital questions of criminal procedure. One extremely important question concerns the validity of the indictment (R. 11) under which Petitioners were convicted. It appears that this Court has never directly passed upon the requisites of an indictment for criminal income tax evasion. The necessity that such requisites be definitely established, and the importance of the matter, is shown by the fact that criminal indictments (or informations) in tax cases of all types were returned against 8,770 defendants during the fiscal year ended June 30, 1959, of which 702 were income tax and miscellaneous cases. ANNUAL REPORT OF THE COMMISSIONER OF INTERNAL REVENUE FOR THE FISCAL YEAR ENDED JUNE 30, 1959, p. 21. In this case the District Court upheld an indictment which purported to charge *individual employees* with attempting to evade *taxes of a corporation*, and which was in skeleton form, falling far

short of informing the accused of the nature and cause of the accusation against them to any reasonable degree.

Another important question on the merits concerns the effect of acceptance of a plea of *nolo contendere*, and the procedure which should follow entry of such plea. It is the contention of Petitioners that the record shows that the District Court based the convictions and sentences upon evidence adduced at the Farnsworth trial — rather than upon the pleas of *nolo contendere* — and that the District Court erred in so doing. Indeed, the U. S. Attorney in his oral argument to the Court of Appeals in this case admitted that it would be impossible for the District Court to have overlooked such evidence when sentencing these Petitioners. There is considerable doubt concerning the application and effect of the plea of *nolo contendere* authorized by Rule 11 — which doubt should be resolved by this Court. Existence of the doubt, and the importance of the question, is shown by the recent statement of policy of the United States District Court for the Southern District of Texas—presumably as a result of this case—that pleas of *nolo contendere* by individuals in felony cases will no longer be accepted, as reported in The Houston Post, May 22, 1960, Sec. 1, p. 16, reproduced in Appendix D., *infra*, p. 53. Unless review is granted, such defendants in the Southern District of Texas will not hereafter have the opportunity to enter such a plea. That is an unwarranted restriction of judicial discretion which is not contemplated by Rule 11.

3. Error in Decision Below

On the main question, it appears that the Court of Appeals erred in two respects: (1) It erred in holding that a motion in arrest of judgment must be timely under Rule 34 in order to toll the time for appeal under Rule 37(a)(2); and (2) it erred in holding that the motion in arrest of judgment, filed in the instant case, was not timely under Rule 34.

The real question is: Does Rule 37(a)(2) mean what it plainly says? It explicitly states that the longer time for appeal applies "if *a motion* for a new trial or in arrest of judgment has been made within the 10-day period" *following entry of judgment*. Rule 37(a)(2) does not state that the motion must be timely under Rule 34, or have any other quality — it requires only "*a motion* . . . in arrest of judgment." (Emphasis supplied.) *Lujan* v. *United States*, 204 F. 2d 171 (10 Cir. 1953), *infra*, p. 49; *Smith* v. *United States*, 273 F. 2d 462 (10 Cir. 1959).

It is clear that the motions in arrest of judgment in the instant case were timely filed under Rule 37(a)(2), since they were filed well "within 10 days after entry of the judgment." Furthermore, even if the motions in arrest of judgment were required to be timely under Rule 34, it clearly appears that they were filed "within 5 days after determination of guilt" under that Rule. The holding of the Court of Appeals below that the "determination of guilt," within the meaning of Rule 34, occurred when the *nolo contendere* pleas were entered comports with neither the plain language of Rule 34 nor with a logical construction of the Federal Rules of Criminal Procedure as a whole, especially when viewed in the light of the events in this case.

"Determination," in legal parlance, means "The decision of a court of justice. It implies an ending or finality, the ending of a controversy or suit." BLACK, LAW DICTIONARY 536 (4th ed. 1951). It certainly seems illogical to regard entry of the plea as a *determination*, in view of the provision of Rule 32(d) that "A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed." Under such construction a defendant would be put in the ridiculous position of having to move to arrest a judgment not yet in existence, when his plea of *nolo contendere* might later be withdrawn.

Under the decision below Petitioners would have been required to file their motions in arrest of judgment *nearly three months* before pronouncement of sentence or entry of the judgments. Of course, they would not have done so, even if they had known of the construction subsequently adopted by the Court of Appeals below. To require a defendant who is awaiting sentence after a plea of *nolo contendere* to move in arrest of judgment *within 5 days after entry of the plea,* is to deny him the right to so move. In view of the presentence investigation procedure prescribed by Rule 32(c), and as a matter of common experience, entry of the plea will practically always precede the sentencing by more than 5 days. The fair and logical construction of the rules would be that the "determination of guilt" does not occur until the judgment is entered — certainly this should be so for the purpose of determining the timeliness of appeals. The decision below reduces Rule 37(a)(2) to a virtual trap.

4. Errors of the District Court

Unless review is granted, illegal convictions and sentences will be allowed to stand. The convictions and sentences are illegal because: (1) They are based upon a fatally defective indictment; (2) the District Court erred in deferring the sentencing of Petitioners and basing their convictions and sentences upon evidence adduced at the Farnsworth trial; and (3) the prison sentences were beyond the jurisdiction of the District Court to the extent that they exceeded imprisonment for one year.

The indictment (R. 11) appears to be wholly insufficient in that neither the substantive counts nor the conspiracy count charge all of the *essential elements* of the crime of attempted tax evasion. It fails to charge that there was a tax deficiency, which — as recognized by this Court in *Lawn*

v. *United States*, 355 U.S. 339, 361 (1958) — is "[O]ne of the basic elements of the offense." *Small* v. *United States*, 255 F. 2d 604, 606 (1 Cir. 1958). It fails to charge that the accused had knowledge of any tax deficiency, which would be required under the decision of this Court in *Ingram* v. *United States*, 360 U.S. 672 (1959). It even fails to charge that the accused filed the corporate tax returns. For lack of a direct charge of the foregoing *essential ingredients* of the offense, the indictment fails to charge an offense against the United States and is fatally defective.

Furthermore, the indictment is so vague, indefinite and uncertain that it fails to inform Petitioners of the nature and cause of the accusation against them within the meaning of the Sixth Amendment to the Constitution of the United States — it merely follows the language of the statutes. The indictment purports to charge Petitioners with attempted evasion of income taxes imposed upon *a corporation* — not their *personal income taxes*. Under such circumstances, it certainly should state facts sufficient, as a practical matter, to apprise each Petitioner of the criminal acts attributed to him, with reasonable detail, so that each would know the charge against him, and could prepare his defenses thereto. The instant indictment utterly fails in these respects. While the short-form indictment could possibly be justified in a personal income tax evasion case, it is grossly inadequate and unfair in a corporate income tax evasion case involving employees of varying responsibilities. The practice of using such an inadequate indictment should be repudiated by this Court.

The District Court departed sharply from normal and customary procedure by deferring the sentencing of Petitioners until after it had presided at the lengthy Farnsworth trial. Normal procedure would have called for sentencing shortly after entry of the *nolo contendere* pleas.

Under the circumstances, it is submitted that the District Court violated the command of Rule 32(a) that "Sentence shall be imposed without unreasonable delay." Petitioners believe that the record leaves the inescapable inference that they were *convicted and sentenced* upon the basis of evidence adduced at the Farnsworth trial — rather than upon their *nolo contendere* pleas. Petitioners were neither present nor represented at the Farnsworth trial, were not parties to it, and the evidence against them was received without the benefit of cross-examination or rebuttal evidence on behalf of Petitioners. They were tried *in absentia* and were not confronted with the witnesses against them. U. S. CONST. amend. VI.

Petitioners submit that the proceedings by the District Court constituted an implied rejection of the pleas of *nolo contendere*, and that the District Court thereby lost jurisdiction to convict and punish them as it did. Direct authority for Petitioners' contention is found in *Tucker* v. *United States*, 196 Fed. 260, 268 (7 Cir. 1912), in which, under similar facts, the conviction was reversed.[4] Petitioners should at the very least be granted an opportunity to replead to the indictment.

Although the indictment (R. 11) purported to charge Petitioners with the felonies of willfully attempting to evade corporate taxes, and conspiring to do so, the judgments adjudge them guilty of "filing false and fraudulent corporate income tax returns" and "conspiring to file false and fraudulent corporate income tax returns" (R. 553-559; *infra*, pp. 43-48). The language first quoted describes the

[4] The holding of the *Tucker* case that sentence of imprisonment cannot be had under a plea of *nolo contendere* was overruled in *Hudson* v. *United States*, 272 U.S. 451 (1926); however, its holding that rejection of the plea may be inferred from the fact that evidence was received by the trial court remains intact.

misdemeanor offense proscribed by Sections 7203 and 7207, INT. REV. CODE OF 1954, and Section 145(a), Int. Rev. Code of 1939. These misdemeanor offenses apparently are lesser offenses included within the felony charges. Under 18 U.S.C. §371, conspiracy to commit a misdemeanor subjects the offender to no more than the maximum punishment provided for the misdemeanor. Therefore, it appears that the sentences were beyond the jurisdiction of the District Court to the extent that they exceed imprisonment for one year.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated July 15, 1960

Respectfully submitted,

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APPENDIX A

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Constitution of the United States Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Internal Revenue Code of 1939

Sec. 145. Penalties.

(a) **Failure to file returns, submit information, or pay tax.** Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations

made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution. (53 Stat. 62, as amended, 57 Stat. 144.)

(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with costs of prosecution. (53 Stat. 62.)

* * *

Internal Revenue Code of 1954

Sec. 7201. Attempt to Evade or Defeat Tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the cost of prosecution. (68A Stat. 851.)

Sec. 7203. Willful Failure to File Return, Supply Information, or Pay Tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the cost of prosecution. (68A Stat. 851.)

Sec. 7207. Fraudulent Returns, Statements, or Other Documents.

Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both. (68A Stat. 853.)

United States Code

Sec. 371. Conspiracy to Commit Offense or to Defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not

more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. (62 Stat. 701.)

Sec. 2255. Federal Custody; Remedies on Motion Attacking Sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or i ringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. (62 Stat. 967, as amended, 63 Stat. 105.)

Federal Rules of Criminal Procedure

Rule 2. Purpose and Construction.

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

Rule 7. The Indictment and the Information.

(c) **Nature and Contents.** The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated

by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

• • •

Rule 11. Pleas.

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

Rule 12. Pleadings and Motions Before Trial; Defenses and Objections.

• • •

(b) The Motion Raising Defenses and Objections.

• • •

(2) Defenses and Objections Which Must Be Raised. Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial.

The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

* * *

Rule 32. Sentence and Judgment.

(a) Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

(b) Judgment. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(c) Presentence Investigation.

(1) When Made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) Report. The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteris-

tics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court.

(d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

(e) Probation. After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation as provided by law.

Rule 34. Arrest of Judgment.

The court shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the court may fix during the 5-day period.

Rule 37. Taking Appeal; and Petition for Writ of Certiorari.

(a) Taking Appeal to a Court of Appeals.

(1) Notice of Appeal. An appeal permitted by law from a district court to a court of appeals is taken by filing with the clerk of the district court a notice of appeal in duplicate. Petitions for allowance of appeal, citations and assignments of error in cases governed by these rules are abolished. The notice of appeal shall set forth the title of the case, the name

and address of the appellant and of appellant's attorney, a general statement of the offense, a concise statement of the judgment or order, giving its date and any sentence imposed, the place of confinement if the defendant is in custody and a statement that the appellant appeals from the judgment or order. The notice of appeal shall be signed by the appellant or appellant's attorney, or by the clerk if the notice is prepared by the clerk as provided in paragraph (2) of this subdivision. The duplicate notice of appeal and a statement of the docket entries shall be forwarded immediately by the clerk of the district court to the clerk of the court of appeals. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to adverse parties, but his failure so to do does not affect the validity of the appeal.

(2) **Time for Taking Appeal.** An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

* * *

Rule 45. Time.

* * *

(b) **Enlargement.** When an act is required or allowed to be done at or within a specified time, the court for cause

shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal.

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APPENDIX B

APPENDIX B

OPINIONS AND JUDGMENTS BELOW

Court of Appeals Opinion

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17888

H. A. LOTT, LEE BLOCKER AND LORN D. FRAZIER,
Appellants,

VERSUS

UNITED STATES OF AMERICA,
Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

(June 20, 1960.)

Before CAMERON and JONES, Circuit Judges, and WRIGHT, District Judge.

JONES, Circuit Judge: The three appellants and two others were charged, in the first count of a five-count indictment, with attempting to evade and defeat income taxes of a named corporation for the year 1951. Three other counts charged the same offense for each of the years

1952, 1953 and 1954. A fifth count of the indictment charged a conspiracy to evade and defeat the corporation's income tax for the years 1951 to 1954, inclusive. The appellants, two of them on March 17, 1959, and the third on March 20, 1959, by leave of court, withdrew pleas of not guilty and tendered pleas of nolo contendere. These pleas were accepted by the court. Sentencing was deferred. During the period of deferment the judge, who had permitted the filing of and had accepted the nolo contendere pleas, presided over the trial of the two others who had been jointly indicted with the appellants. At this trial one of those tried was acquitted and the jury was unable to agree upon a verdict as to the other. Thereafter, on June 19, 1959, the court, with the same judge presiding, called the appellants before him for sentencing. The appellant Blocker was sentenced to three years imprisonment. The appellants Frazier and Lott were each sentenced to two years imprisonment. A fine of $20,000 was imposed upon each appellant. The sentences were pronounced from the bench on June 19, 1959, and the formal written judgments were filed on June 22, 1959. On the following day, June 23, 1959, motions in arrest of judgment were filed by each appellant. These motions were denied on July 13, 1959. The appellant Lott filed notice of appeal on July 15, 1959, and the appellants Blocker and Frazier filed notice of appeal on July 17, 1959.

Although stated in different language, the claims of error made by the appellant Lott and those of the appellants Blocker and Frazier are substantially the same. It is contended that the indictments are insufficient; that the court was without jurisdiction to impose sentences on the pleas of nolo contendere after hearing the evidence adduced at the trial of the others who were jointly indicted; and that the sentences were beyond the jurisdiction of the court. These questions going to the merits are not reached.

The United States has moved to dismiss the appeals on the ground that the notices of appeal were not filed within ten days after the entry of the judgments appealed from as required by Rule 37(a)(2), Fed. Rules Crim. Proc. 18 U.S.C.A.; and that the motions in arrest of judgment did not enlarge the time for giving notice of appeal because, although filed within ten days of the entry of the judgment, the motions were not filed within five days after the determination of guilt as required by Rule 34 Fed. Rules Crim. Proc. 18 U.S.C.A. The appellants suggest that because the Government has designated portions of the record to be brought up on appeal and has filed a brief on the merits its motion to dismiss ought not be entertained. But lack of jurisdiction can be raised at any time and the court is under a duty to notice absence of jurisdiction even though it is not raised by a party. Rule 12(b)(2) Fed. Rules Crim. Proc. 18 U.S.C.A.

The appellants are insistent that under Rule 37(a)(2)[1] an appeal may be taken within ten days after the entry of an order denying a motion in arrest of judgment if such motion was filed within ten days after judgment even though the motion in arrest of judgment was filed out of time and the notice of appeal was not filed until more than ten days had elapsed after judgment. This, the appellants say, is the clear, explicit and unambiguous meaning of Rule 37(a)(2) notwithstanding the provision of Rule 34[2] requir-

[1] An appeal by a defendant may be taken within ten days after entry of the judgment or order appealed from, but if a motion for new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. Rule 37(a)(2) Fed. Rules Crim. Proc. 18 U.S.C.A.

[2] The court shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the court may fix during the 5-day period. Rule 34, Fed. Rules Crim. Proc. 18 U.S.C.A.

ing the filing of a motion in arrest of judgment within five days after determination of guilt. Support for the appellants' position is found in *Lujan* v. *United States*, 10th Cir. 1953, 204 F. 2d 171, where the proposition for which appellants contend is adopted and applied. In the Lujan case the motion was for a new trial under Rule 33 Fed. Rules Crim. Proc. 18 U.S.C.A. rather than a motion for arrest of judgment such as is before us. We do not think this difference would call for a distinction.

The doctrine of Lujan was expressly rejected in *United States* v. *Bertone*, 3rd Cir. 1957, 249 F. 2d 156. There the defendant was convicted on March 28, 1957, sentenced in open court on April 12, 1957, and a judgment of sentence and commitment was entered on April 18, 1957. On April 22, 1957, the defendant filed motions for a new trial and in arrest of judgment. On August 9, 1957, an order was entered denying the motions. On August 19, 1957, the defendant gave notice of appeal from the judgment and sentence of April 18, 1957, and from the August 19, 1957, order. The motions were filed within ten days after the entry of the judgment as is the case here. The appeal was taken within ten days after the entry of the order denying the motions, as is the case here. The motions were not timely filed as was the case in Lujan, and as is the case here unless, of course, the entry of the pleas of nolo contendere did not result in determination of guilt within the meaning of Rule 34. In the Bertone case it was held that the appeal was not taken in time. The same conclusion, upon a similar factual situation, was reached in *Marion* v. *United States*, 9th Cir. 1948, 171 F. 2d 185, cert. den. 337 U.S. 944, 69 S. Ct. 1500, 93 L. Ed. 1747.

We are in agreement with the Third Circuit that the rule announced in the Lujan case is unsound and ought not to be followed. To hold, as Lujan holds, that the untimely filing

of a motion for a new trial or in arrest of judgment will toll the running of the time in which an appeal may be taken, although the motion could not be considered on its merits, produces a result which we think was not intended. It does not seem that the Supreme Court, in framing the rules, had the design of permitting a convicted defendant to file out of time a motion which the court could not have given him leave to file after the time for filing had expired,[3] and so obtain an extension of the time for taking an appeal even though the court itself was powerless to grant such an extension.

This Court has, heretofore considered the question and has adopted the rule announced in Bertone, citing that opinion with approval. This Court has succinctly stated the principle in this language:

> "To extend the time for taking an appeal, a motion for new trial must be both (a) timely made under Rule 33 and (b) made within ten days after entry of the judgment of conviction under Rule 37(a)(2)." *O'Neal* v. *United States*, 5th Cir. 1959, 264 F. 2d 809. Cf. *Massicot* v. *United States*, 5th Cir. 1958, 254 F. 2d 58.

If the pleas of nolo contendere and the acceptance of them were determinations of guilt it follows that the motions in arrest of judgment were filed too late, the time for appeal was not tolled, and the appeals were not taken in time. If, on the other hand there was no determination of guilt, as that phrase is used in Rule 34, until the judgment and sen-

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[3] When an act is required or allowed to be done at or within a specified time the court for cause shown may . . . order the period enlarged . . . or . . . permit the act to be done after the expiration of the specified period . . . but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal. Rule 45(b), Fed. Rules Crim. Proc. 18 U.S.C.A.

tence, then the motions were timely made and the appeals were timely taken.

After a jury trial a determination of guilt has been made when a verdict of guilty has been returned by the jury and accepted by the Court. *Brown* v. *United States*, 9th Cir. 1952, 198 F. 2d 999; *Finn* v. *United States*, 4th Cir. 1958, 256 F. 2d 304. A determination of guilt has been made when a plea of guilty has been entered. *Marteney* v. *United States*, 10th Cir. 1954, 216 F. 2d 760. The appellants urge that a plea of nolo contendere is a plea in avoidance without a confession and that it does not result in a determination of guilt. It is, so appellants say, only an implied confession of guilt, a mere statement of unwillingness to contest, and no more. The federal courts, however, have long held that the legal effect of a plea of nolo contendere is the same as a plea of guilty for all purposes so far as regards proceedings on the indictment. *United States* v. *Hartwell*, Cir. Ct. Mass. 1869, 3 Cliff. 221, 26 Fed. Cas. 196. A leading case is *United States* v. *Lair*, 8th Cir. 1912, 195 F. 47, where it is said:

> "In fact, the defendant admitted that he committed the offense charged within that district; for his plea of nolo contendere is in effect a plea of guilty to every essential element of the offense well pleaded in the charge against him, and warrants his conviction thereof without more." 195 F. 47, 52.

On the question of guilt or innocence, the Supreme Court has held that the plea of nolo contendere is as conclusive as a plea of guilty would have been, and after such a plea nothing is left but to render judgment. *United States* v. *Norris*, 281 U.S. 619, 50 S. Ct. 922, 74 L. Ed. 1076. See also *Hudson* v. *United States*, 272 U.S. 451, 47 S. Ct. 127, 71 L. Ed. 347; *United States* v. *Frankfort Distillers*, 324 U.S. 293, 65 S. Ct. 661, 89 L. Ed. 951. The well settled principle that

for the purposes of the case, the plea of nolo contendere is the equivalent of a plea of guilty has been recognized and applied by this Court. *Farnsworth* v. *Zerbst*, 5th Cir. 1938, 97 F. 2d 255. Cf. *Piassick* v. *United States*, 5th Cir. 1958, 253 F. 2d 658; *Mickler* v. *Fahs*, 5th Cir. 1957, 243 F. 2d 515. The state courts, generally, are in accord. Annot. 152 A.L.R. 253; 4 Wharton Criminal Law and Procedure, 772, § 1903; Lenvin and Myers, Nolo Contendere: Its Nature and Implications, 51 Yale Law J. 1255. The rule being as it is, it follows that the determination of guilt of the appellants was made when their pleas of nolo contendere were tendered to and accepted by the court.

However may be the law as to when, in the usual case, there is a determination of guilt for the measuring of the time for filing a Rule 34 motion, the appellants say that there was not, in fact, any determination of guilt at the time of the pleas. That determination, say the appellants, was not made until after the trial of the other defendants and the determination of guilt was made by the court, and was based upon the evidence heard by the court at the trial rather than upon the pleas of nolo contendere. Upon this theory the time within which the motions in arrest of judgment could be filed would begin at the time the sentences were imposed. In considering the contention of the appellants that they were sentenced upon a determination of guilt based upon the evidence at the trial of the other defendants rather than upon their pleas of nolo contendere, a look at the record becomes desirable. What happened is this; during the proceedings for sentencing the court heard statements of counsel for the appellants seeking mitigation of punishment. In these statements references were frequent to matters which transpired at the trial of the other defendants. It was brought out that counsel for the appellants had a representative at the trial, taking

notes, and reporting to counsel so that they knew, in the words of one of the attorneys "exactly what was testified, in substance." Two of the three appellants made statements on behalf of themselves. Character witnesses numbering five, seven, and five, for the respective appellants, testified. At the conclusion of the hearing the court stated, "I have found each guilty of the felonies as contained in the grand jury indictment." Then followed an oral pronouncement by the court of the sentences. This hearing was on June 19, 1959. On June 22, 1959, the court entered, as to each appellant, a formal judgment and commitment. From them we quote:

> "It is adjudged that the defendant has been convicted upon his plea of nolo contendere of the offense of . . . and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,
>
> "It is adjudged that the defendant is guilty as charged and convicted."

We need not consider whether the judgment was the oral pronouncement of sentence or the formal writing. Cf. *Pollard* v. *United States*, 352 U. S. 354, 77 S. Ct. 481, 1 L. Ed. 2d 393; *United States* v. *Hark*, 320 U. S. 531, 64 S. Ct. 359, 88 L. Ed. 290; *Patterson* v. *United States*, 5th Cir. 1950, 183 F. 2d 687; *Spriggs* v. *United States*, 9th Cir. 1955, 225 F. 2d 865. In neither the oral sentence nor the formal judgment does it appear that the determination of guilt is based upon the trial of the other defendants. Any such conclusion is negatived by recital in the formal judgment that "the defendant has been convicted upon his plea of nolo contendere." We see no merit in this contention of the appellants.

We can find no principle that would sustain the appellants in their contention that they have given and filed a notice of appeal from the judgments of conviction and sentence within the time prescribed by the applicable rule.

The appellants ask that we treat the notices of appeal as being from the order denying the motions in arrest of judgment in the event we hold that there were no timely notices given of appeals from the judgments of conviction and sentence. An order overruling a motion in arrest of judgment is, it seems, an appealable order. *Sutton* v. *United States*, 5th Cir. 1946, 157 F. 2d 661. The difficulty with the appellants' proposal is that, since the motion was not timely filed, the district court had no jurisdiction of the motion and all that this Court could do would be to direct that the order denying the motion be affirmed for want of jurisdiction. Such an ineffectual result need not be further considered.

It is contended by the appellants that if their appeal from the judgment was not taken in time, we should treat the motion in arrest of judgment as a motion to vacate the sentence under 28 U.S.C.A. § 2255, and then treat the notice of appeal as being directed to the court's order as denying Section 2255 relief. The Tenth Circuit, in a case where a motion in arrest of judgment was filed too late, treated the motion as one to vacate. In its opinion it was said:

> "The 'motions in arrest of judgment', having been filed more than five days after determination of guilt, were untimely under Rule 34 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., and the government takes the preliminary position that the trial court was without authority to treat the pleadings as motions to vacate under Section 2255 for the purpose of considering the legal questions raised by the motions. Section 2255 specifically authorizes 'A prisoner in

> custody under sentence of a court * * * claiming * * * that the court was without jurisdiction to impose such sentence * * * may move the court which imposed the sentence to vacate, set aside or correct the sentence * * * at any time.' Treated as motions to vacate, the pleadings were undoubtedly timely to challenge the legal sufficiency of the counts in the indictment to state a federal offense. Having in mind that it is the content of the pleadings and not the label which determines their nature and effect, we can see no impropriety in the court's treatment of the pleadings as motions to vacate under Section 2255." 216 F. 2d 760, 762.

The Fourth Circuit adopted the doctrine in *Finn* v. *United States*, 4th Cir. 1958, 256 F. 2d 304, and used it as a means for reaching the merits of the question presented by the motion and the ruling upon it.

The appellants are not presently in confinement and recognize that 2255 relief is not available to anyone who is not in custody under sentence of a court. *Heflin* v. *United States*, 358 U. S. 415, 79 S. Ct. 451, 3 L. Ed. 2d 407. They would have us surmount this barrier by following the pronouncement of the Ninth Circuit in *Black* v. *United States*, 9th Cir. 1959, 269 F. 2d 38, cert. den. 361 U. S. 938, 80 S. Ct. 209, 4 L. Ed. 2d 357. Black had attempted to take an appeal and, under Rule 38(a)(2), had elected not to begin serving his sentence. The appeal was filed out of time. He later filed a Section 2255 motion and attempted, though not in custody, to appeal from an order denying relief. It was held that since the 2255 motion cannot be maintained while there is a pending appeal in good standing, the appeal was deemed abandoned by the filing of the 2255 motion. Since Black would be entitled to freedom from custody only if he had an appeal pending from his conviction and sentence, he was regarded as being in technical custody after the

filing of his 2255 motion for the purpose of conferring 2255 jurisdiction. In this case, the appellants assert, they should be regarded as being in technical custody for the purpose of allowing jurisdiction over their Rule 34 motions which they would have us treat as being made under Section 2255. It might be observed that, when the Rule 34 motions were filed, the time for appeal had not run and the appellants could not claim that they were then in technical, any more than actual, custody.

We have mapped but a part of the tortuous road over which the appellants would lead us in seeking to sustain our jurisdiction to review this case. In going with them as far as the foregoing outline would take us, it would be necessary to hold that the Rule 34 motions were not Rule 34 motions at all but, in effect, Section 2255 motions; and that the appellants, although not in custody in any real sense,[4] are in technical custody so as to permit the court to entertain the mislabeled 2255 motion. But could we travel with appellants thus far we would then become confronted with the question as to whether we may treat the notices of appeal as being from the order denying the Rule 34 motions treated as Section 2255 motions. The notices of appeal purport to be only from the judgments and sentences. We do not have in the notices of appeal an inclusion of the orders on the motions as was the case in *Marteney v. United States, supra*. Although it is provided that a court shall not be required to entertain a second or successive motion under Section 2255, it may, in its discretion, do so. *Wells v. United States*, 5th Cir. 1954, 219 F. 2d 112.

To remove any question as to whether a 2255 motion might be filed and to avoid circuity of actions in resolving

[4] The notices of appeal state that the appellants are at liberty on bail.

the questions, it might be well to review, to the extent permissible, the questions which the appellants assign as error. In the case of *Heflin* v. *United States*, *supra*, the Supreme Court treated a motion under Section 2255 as a motion under Rule 35, Fed. Rules Crim. Proc. 18 U.S.C.A., and held that although there was no timely application for certiorari to review an order on a Rule 35 motion, the Supreme Court would, in order to avoid a circuity of actions, dispense with the requirements of its Rule 22(2). But we are not authorized to dispense with the rules that govern our jurisdiction. On the contrary, we are expressly prohibited from extending the time for taking appeals. Rule 45(b), Fed. Rules Crim. Proc. 18 U.S.C.A. So also the Rules require that the notice of appeal shall set forth, among other things, "a concise statement of the judgment or order, giving its date, and any sentence imposed." Rule 37(a)(1), Fed. Rules Crim Proc. 18 U.S.C.A. We cannot treat an express reference in the notice of appeal to a judgment and sentence of a specified date as evidencing an appeal from an order upon a motion subsequently filed, no matter how the motion may be treated. Cf. *Martin* v. *United States*, 10th Cir. 1959, 263 F. 2d 516; *Jacobanis* v. *United States*, 1st Cir. 1958, 256 F. 2d 485.

We reach, finally, the conclusion that the jurisdiction of this Court has not been invoked by timely notices of appeal. So concluding we dismiss the appeals without consideration of the other questions which the appellants have asked us to decide. It would not be appropriate to suggest whether, and if so how, those questions may be hereafter raised.

The appeals are

DISMISSED.

CAMERON, Circuit Judge, Dissenting.

Court of Appeals Judgment

JUDGMENT.

Extract from the Minutes of June 20, 1960

H. A. LOTT, LEE BLOCKER AND LORN D. FRAZIER,

No. 17888. versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and on the motion filed by appellee on February 26, 1960 to dismiss the appeals, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeals in this cause be, and the same are hereby, dismissed.

"Cameron, Circuit Judge, Dissenting."

Judgment and Commitment — H. A. Lott

Filed Jun. 22, 1959.

United States District Court for the Southern District of Texas, Houston Division.

United States of America,

v. No. Cr. 13298.

H. A. Lott

On the 19th day of June, 1959 came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of nolo contendere of the offense of filing false and fraudulent corporate income tax returns, in violation of Title 26, U.S. Code, Section 145(b), as charged in Counts 1, 2 and 3, and in violation of Title 26, U. S. Code Section 7201, as charged in Count 4; and the offense of conspiring to file false and fraudulent corporate income tax returns, in violation of Title 18, U. S. Code, Section 371, as charged in Count 5; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2)

Years on each of Counts 1, 2, 3, 4 and 5, to run concurrently, making a total of two years.

It Is Further Adjudged that the defendant is hereby fined the sums of Two Thousand Five Hundred ($2,500.00) Dollars on Count 1, Two Thousand Five Hundred ($2,500.00) Dollars on Count 2, Five Thousand ($5,000.00) Dollars on Count 3, Five Thousand ($5,000.00) Dollars on Count 4, and Five Thousand ($5,000.00) Dollars on Count 5, to run consecutively making a total of $20,000.00.

It Is Adjudged that the United States of America shall recover from the defendant the sum of $20,000.00, named above, for which execution may issue. In default of payment of said fine, the defendant is to be further committed until the fine is paid or until he shall be otherwise lawfully discharged.

It Is Ordered that the defendant is to report to the United States Marshal at 10:00 A. M., on July 20, 1959, to begin service of this sentence.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Done the 22nd day of June, 1959.

ALLEN B. HANNAY,
United States District Judge.

The Court recommends commitment to: Seagoville, Texas.

Approved: F.L.H.

Judgment and Commitment — Lee Blocker

Filed Jun. 22, 1959.

United States District Court for the Southern District of Texas, Houston Division.

United States of America,

v. No. Cr. 13298.

Lee Blocker.

On the 19th day of June, 1959 came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of nolo contendere of the offense of filing false and fraudulent corporate income tax returns, in violation of Title 26, U. S. Code, Section 145(b), as charged in Counts 1, 2 and 3, and in violation of Title 26, U. S. Code, Section 7201, as charged in Count 4; and the offense of conspiring to file false and fraudulent corporate income tax returns, in violation of Title 18, U. S. Code, Section 371, as charged in Count 5; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Three (3) Years on each of Counts 1, 2, 3, 4 and 5, to run concurrently, making a total of three years.

It Is Further Adjudged that the defendant is hereby fined the sums of Two Thousand Five Hundred ($2,500.00) Dollars on Count 1, Two Thousand Five Hundred ($2,500.00) Dollars on Count 2, Five Thousand ($5,000.00) Dollars on Count 3, Five Thousand ($5,000.00) Dollars on Count 4, and Five Thousand ($5,000.00) Dollars on Count 5, to run consecutively making a total of $20,000.00.

It Is Adjudged that the United States of America shall recover from the defendant the sum of $20,000.00, named above, for which execution may issue. In default of payment of said fine, the defendant is to be further committed until the fine is paid or until he shall be otherwise lawfully discharged.

It Is Ordered that the defendant is to report to the United States Marshal at 10:00 A.M., on July 20, 1959, to begin service of this sentence.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Done the 22nd day of June, 1959.

ALLEN B. HANNAY,
United States District Judge.

The Court recommends commitment to: Seagoville, Texas.

Approved: F L.H.

Judgment and Commitment — Lorn D. Frazier

Filed Jun. 22, 1959.

United States District Court for the Southern District of Texas, Houston Division.

United States of America,

v. No. Cr. 13298.

Lorn D. Frazier.

On the 19th day of June, 1959 came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of nolo contendere of the offense of filing false and fraudulent corporate income tax returns, in violation of Title 26, U. S. Code, Section 145(b), as charged in Counts 1, 2 and 3, and in violation of Title 26 U. S. Code, Section 7201, as charged in Count 4; and the offense of conspiring to file false and fraudulent corporate income tax returns, in violation of Title 18, U. S. Code, Section 371, as charged in Count 5; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) Years on each of Counts 1, 2, 3, 4 and 5, to run concurrently, making a total of two years.

It Is Further Adjudged that the defendant is hereby fined the sums of Two Thousand Five Hundred ($2,500.00) Dollars on Count 1, Two Thousand Five Hundred ($2,500.00) Dollars on Count 2, Five Thousand ($5,000.00) Dollars on Count 3, Five Thousand ($5,000.00) Dollars on Count 4, and Five Thousand ($5,000.00) Dollars on Count 5, to run consecutively, making a total of $20,000.00.

It Is Adjudged that the United States of America shall recover from the defendant the sum of $20,000.00, named above, for which execution may issue. In default of payment of said fine, the defendant is to be further committed until the fine is paid or until he shall be otherwise lawfully discharged.

It Is Ordered that the defendant is to report to the United States Marshal at 10:00 A.M., on July 20, 1959, to begin service of this sentence.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Done the 22nd day of June, 1959.

ALLEN B. HANNAY,
United States District Judge

The Court recommends commitment to: Seagoville, Texas.

Approved: F.L.H.

APPENDIX C

Conflicting Tenth Circuit Opinion

LUJAN v. UNITED STATES

No. 4663.

United States Court of Appeals,
Tenth Circuit.

May 5, 1953.
(204 F. 2d 171)

Before BRATTON, MURRAH and PICKETT, Circuit udges.

BRATTON, Circuit Judge.

This is a criminal case and it is pending on motion of ie government to dismiss the appeal. The ground of the otion is that the notice of appeal was filed out of time nd that therefore the court is without jurisdiction to enter- ain the appeal.

On January 16, 1952, the verdict was returned finding ppellant guilty. On January 23, sentence was imposed and rmal judgment entered. On the same day, the court en- red an order purporting to grant appellant leave to file ithin ten days thereafter a motion for judgment of ac- uittal notwithstanding the verdict and a motion for new ial. On January 30, both motions were filed. On February , both motions were denied. On February 12, a formal der was entered denying the motion for new trial. And February 16, the notice of appeal was filed.

It is well settled that the filing of a notice of appeal ithin the time fixed by the Rules of Criminal Procedure, U. S. C., is jurisdictional, and that the filing of the notice t of time does not confer jurisdiction upon the appellate urt. United States v. Bloom, 2 Cir., 164 F. 2d 556, cer-

tiorari denied 333 U. S. 857, 68 S. Ct. 726, 92 L. Ed. 1137; United States v. Froehlich, 2 Cir., 166 F. 2d 84; Swihart v. United States, 10 Cir., 169 F. 2d 808.

Rule of Criminal Procedure 33 provides in presently pertinent part that a motion for new trial based upon any ground other than newly discovered evidence shall be made within five days after verdict or finding of guilty or within such further time as the court may fix during the five-day period. The motion for new trial in this case was not based upon newly discovered evidence. It was predicated upon other grounds and it was not filed within five days after the finding of guilty. The court entered an order purporting to enlarge the time for the filing of the motion but the order was entered more than five days after the finding of guilty. And after the expiration of the five-day period following the finding of guilty, the court was without jurisdiction to enter the order enlarging the time for the filing of the motion for new trial. Since the motion was not filed within five days after the finding of guilty, and since no order was entered during such five-day period enlarging the time, the motion was filed out of time within the purview of Rule 33. Pugh v. United States, 9 Cir., 197 F. 2d 509. But this rule concerns itself solely and exclusively with the time within which a motion for new trial may be filed. It does not undertake to fix the time within which the notice of appeal shall be filed. It does not pretend to exert any impact upon the time for the filing of the notice of appeal. It does not project itself into that field in any manner or to any extent.

Rule of Criminal Procedure 37 — not 33 — relates to the time and manner for the taking of an appeal. It provides among other things that an appeal authorized by law from a district court to a court of appeals is taken by

filing with the clerk of the district court a notice of appeal in duplicate, and that an appeal by a defendant may be taken within ten days after entry of the judgment or order appealed from, but if a motion for new trial has been made within the ten-day period, an appeal from the judgment of conviction may be taken within ten days after entry of the order denying the motion. The motion for new trial in this case was filed less than ten days after the imposition of sentence and entry of the judgment. While not filed within five days after the finding of guilty, and while no order was entered during such five-day period enlarging the time for the filing of the motion, it was filed within ten days after entry of the judgment. Significantly, Rule 37 does not provide that if a motion for new trial is filed within five days after return of verdict or finding of guilty, or within such further time as the court may fix during such five-day period, the notice of appeal shall be filed within ten days after entry of the order denying the motion. It does not speak in express terms of a motion for new trial filed within such five-day period, or within such enlarged period. It makes no express reference to a motion filed within either of such periods. And it fails to contain any language indicating even by clear implication that it is limited to a motion seasonably filed under Rule 33. The sweep of the rule is to provide without condition or qualification that an appeal by a defendant may be taken within ten days after entry of judgment or order appealed from, and further that if a motion for new trial has been made within the ten-day period then an appeal from the judgment may be taken within ten days after entry of the order denying the motion. The motion for new trial having been filed within ten days after entry of the judgment, and the notice of appeal having been filed within ten days after entry of the order denying the motion, the motion to dismiss the appeal is not well taken and is denied.

APPEND

APPENDIX D

Newspaper Article

PAGE 16, SECTION 1 THE HOUSTON POST
SUNDAY, MAY 22, 1960

Area U.S. Judges Rule Out Pleas of 'Nolo Contendere'

Federal judges in the Southern District of Texas will no longer accept pleas of nolo contendere from individuals charged with felony offenses, U. S. District Judge Allen B. Hannay confirmed Saturday.

The new policy came to light when Johnny B. Watkins, through his attorney, Gabriel M. Nahas, attempted to enter the plea to charges of making a false statement in a job application to the Post Office here.

FEDERAL JUDGE Joe Ingraham refused to accept the plea, saying that the district judges had agreed to take nolo contendere pleas only in some cases involving corporations and misdemeanors.

Nahas then entered a plea of innocent for his client.

In the past a number of persons charged with felonies have entered the plea, which means that they will accept the judgment of the court without admitting guilt or innocence.

Most of the judges have privately considered a nolo contendere plea an out for defendants who do not want to stand in court and say that they have been guilty of a crime.

THE PLEA IS particularly important to corporations which have been charged with civil as well as criminal actions in the same case, such as tax frauds.

A guilty plea in the criminal tax action, which is always tried first, can be used against the defendant later in a civil trial.

Whether or not a nolo contendere plea will be accepted is left to the discretion of the judges in a particular federal district.

COPY

No. 238

In the Supreme Court of the United States

OCTOBER TERM, 1960

H. A. LOTT, LEE BLOCKER AND LORN D. FRAZIER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,
CHARLES K. RICE,
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OPINION BELOW

The opinion of the Court of Appeals (Pet. 29–40) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 20, 1960. (Pet. 41.) The petition for a writ of certiorari was filed on July 15, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the time prescribed by Rule 37(a)(2) of the Federal Rules of Criminal Procedure for noting appeals in a criminal case can be extended by the filing of an untimely motion in arrest of judgment.

STATUTE AND RULES INVOLVED

28 U.S.C. 2255 provides in part:

> SEC. 2255 [as amended by Sec. 114, Act of May 24, 1949, c. 139, 63 Stat. 89]. FEDERAL CUSTODY; REMEDIES ON MOTION ATTACKING SENTENCE
>
> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> * * * * *

Federal Rules of Criminal Procedure:

* * * * *

> Rule 34
>
> ARREST OF JUDGMENT
>
> The court shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the court may fix during the 5-day period.
>
> * * * * *

Rule 36

CLERICAL MISTAKES

Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

Rule 37

TAKING APPEAL; AND PETITION FOR WRIT OF CERTIORARI

(a) Taking Appeal to a Court of Appeals.

* * * * *

(2) *Time for Taking Appeal.*—An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

* * * * *

Rule 45

TIME

* * * * *

(b) *Enlargement.*—When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal.

* * * * *

STATEMENT

Petitioners (together with two others not involved in this proceeding) were indicted for wilfully attempting to evade and defeat corporate income taxes over a four-year period and with conspiring to com-

mit those substantive offenses. (R. 11–23.)[1] Petitioners entered *nolo contendere* pleas on March 17 and 20, 1959. The court accepted the pleas and ordered a pre-sentence investigation. (R. 442–483.) In the meantime, the two remaining co-defendants were tried; one was acquitted and the jury could not agree as to the other. (Pet. 30.) On June 19, 1959, the court heard petitioners' pleas in mitigation (R. 488–551) and imposed the following sentences: upon petitioner Blocker, concurrent three-year prison terms; upon petitioners Frazier and Lott, concurrent two-year prison terms; and upon all petitioners, fines totaling $20,000 each (R. 551–553). Formal written judgments were filed on June 22, 1959. (R. 553–559.) Motions in arrest of judgment were filed on June 23, 1959, and were denied on July 13, 1959. (R. 559–

[1] The first four counts of the indictment reflected the following allegations with respect to the tax liability of Farnsworth and Chambers Company, Inc.:

NET INCOME

Year	Reported	Corrected	Additional
1951	$399,135.98	$763,599.62	$364,463.64
1952	410,937.87	495,528.77	84,590.90
1953	179,628.93	362,929.90	183,300.97
1954	282,441.03	406,898.80	124,457.77
Total	1,272,143.81	2,028,957.09	756,813.28

TAX LIABILITY

Year	Reported	Corrected	Additional
1951	$194,482.68	$482,278.98	$287,796.30
1952	207,135.40	251,122.68	43,987.28
1953	87,907.04	183,223.55	95,316.51
1954	135,797.53	200,515.57	64,718.04
Total	625,322.63	1,117,140.74	491,818.11

569.) Notices of appeal were filed by petitioner Lott on July 15, 1959, and by petitioners Blocker and Frazier on July 17, 1959. (R. 572–573, 613–615.) The Court of Appeals (one judge dissenting without opinion) dismissed the appeals as untimely. (Pet. 40.)

ARGUMENT

The Court of Appeals was plainly correct in dismissing the appeals as untimely. Petitioners filed their notices (on July 15 and 17, 1959) far beyond the 10-day period from the entry of judgments (June 22, 1959) prescribed by Rule 37(a)(2) of the Federal Rules of Criminal Procedure, *supra*, p. 3. The time for appeal was not tolled by the filing of motions in arrest of judgment, since those motions were filed (June 23, 1959) long after the 5-day period following "determination of guilt" (the date of the entry of the *nolo contendere* pleas, March 17 and 20, 1959) prescribed by Rule 34 of the Federal Rules of Criminal Procedure, *supra*, p. 2.[2] As this Court only

[2] Contrary to petitioners' view (Pet. 13–14), the Court of Appeals correctly held that the entry and acceptance of the pleas of *nolo contendere* constituted a "determination of guilt" within the meaning of Rule 34. The situation in the instant case is, in principle, no different from cases involving determinations of guilt based upon jury verdicts (*Drown* v. *United States*, 198 F. 2d 999, 1007 (C.A. 9th), certiorari denied, 344 U.S. 920) or acceptance of guilty pleas (*United States* v. *Bradford*, 194 F. 2d 197, 201 (C.A. 2d); *Marteney* v. *United States*, 216 F. 2d 760, 762 (C.A. 10th)). A plea of *nolo contendere* is an admission of guilt for the purpose of the case. *Hudson* v. *United States*, 272 U.S. 451, 455; *United States* v. *Norris*, 281 U.S. 619, 623; *United States* v. *Frankfort Distilleries*, 324 U.S. 293, 294. Plainly, the 5-day period for moving in arrest of judgment under Rule 34 began running when petitioners' pleas were entered and accepted by the trial court.

recently stated in *United States* v. *Robinson*, 361 U.S. 220, 228, 229, "the taking of an appeal within the prescribed time is mandatory and jurisdictional," and the history of the Federal Rules of Criminal Procedure "seems almost conclusively to show a deliberate intention to eliminate any power of the courts to extend the time for the taking of an appeal."[3] See also Rule 45(b), Federal Rules of Criminal Procedure, *supra*, p. 4.

It is true that the Tenth Circuit's decisions in *Lujan* v. *United States*, 204 F. 2d 171, and *Smith* v. *United States*, 273 F. 2d 462, certiorari denied, June 27, 1960,[4] cannot be reconciled with the decision below or with the decisions of the other courts of appeals. See *O'Neal* v. *United States*, 264 F. 2d 809 (C.A. 5th); *United States* v. *Bertone*, 249 F. 2d 156 (C.A. 3d); *Drown* v. *United States*, 198 F. 2d 999 (C.A. 9th), certiorari denied, 344 U.S. 920; *Marion* v. *United States*, 171 F. 2d 185 (C.A. 9th), certiorari denied, 337 U.S. 944; *Pugh* v. *United States*, 197 F. 2d 509 (C.A. 9th); *Godwin* v. *United States*, 185 F. 2d 411 (C.A. 8th). However, in light of the analysis of the Rules which was made in this Court's subse-

[3] Petitioners' alternative suggestion (Pet. 10, fn. 3) that the untimely motions in arrest be regarded as timely motions under 28 U.S.C. 2255, *supra*, p. 2, to vacate the sentences is without merit. The Section 2255 remedy is available only to a prisoner in custody under sentence of a court. *Heflin* v. *United States*, 358 U.S. 415, 418. Petitioners are at liberty on bail. (Pet. 39.)

[4] In *Smith*, the Tenth Circuit held that the appeal was timely but found against the defendant on the merits. In opposing certiorari, the Government pointed out that the timeliness of the appeal was doubtful.

quent *Robinson* decision, *Lujan* and *Smith* cannot be deemed to have continuing vitality and probably will be overruled by the Tenth Circuit if the issue should again arise.

The narrow issue in *Robinson* was whether the Federal Rules forbade extension of the time for noting appeal in a case where the District Court had found "excusable neglect." In dealing with that question, however, this Court considered the various ramifications which would be attendant upon a holding that the ten-day rule admits of exceptions other than those specified in the Rules. Thus, the Court adverted to the situation which would be created if untimely motions for new trial or untimely motions in arrest of judgment should be permitted to extend the time for appealing. The opinion states (361 U.S. at 225):

> If, as the Court of Appeals has held, the delayed filing of a notice of appeal—found to have resulted from "excusable neglect"—is sufficient to confer jurisdiction of the appeal, it would consistently follow that a District Court may, upon a like finding, permit delayed filing of a motion for new trial under Rule 33, of a motion in arrest of judgment under Rule 34, and the reduction of sentence under Rule 35, at any time—months or even years—after expiration of the periods specifically prescribed in those Rules.

The Court rejected these various possibilities. It observed pointedly (p. 226) that the "precise times" established for the filing of motions for new trial and motions in arrest of judgment limit the power of

the courts to grant such relief. In the light of this discussion, there would seem to be no question that this Court views the filing of an untimely motion in arrest of judgment as wholly ineffective for the purpose of enlarging the time to appeal from a criminal conviction. Since it appears that the Tenth Circuit's view has been rejected in a recent and exhaustive opinion of this Court, we believe that the conflict upon which taxpayer relies has been, for all practical purposes, resolved.[5]

---

[5] Since the Court of Appeals dismissed the appeals on jurisdictional grounds without reaching the merits, we shall not deal at any length with the merits, but shall merely state briefly our reasons for believing that they are insubstantial:

(a) The indictment—a plain, concise and definite statement of facts constituting the offenses charged—sufficiently informed petitioners of the nature of the substantive and conspiracy charges. Thus, among other things, the first four counts (R. 11-23) alleged that petitioners were officers of the corporation involved, set forth the substantial amounts of unreported income and taxes evaded, *supra*, p. 5, and the means of evasion (the falsifying and altering of books and records, the concealing of assets and income and the filing of false and fraudulent corporate tax returns). In the fifth count petitioners were charged with conspiring to commit the substantive offenses by means of the same acts of falsification, alteration and concealment.

(b) Petitioners' further claim that they were convicted on the evidence adduced at the trial of their co-defendants (Pet. 15–16) is without factual basis. The judgments clearly recite that each petitioner was adjudged convicted "upon his plea of *nolo contendere*." (R. 553–559.) The references to the trial of petitioners' co-defendants—not only by the trial court but also by petitioners themselves (R. 525, 541)—were made solely to aid in determining the degree of culpability of each of the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.
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Attorneys.

AUGUST 1960.

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petitioners, all of whom had filed pleas in mitigation before imposition of sentence (R. 487–553).

(c) Petitioners were not, as they assert (Pet. 16–17), convicted on misdemeanor charges. The judgments (R. 553–559; Pet. 43–48) set forth the specific felony statutes and the counts of the felony indictment of which the petitioners were adjudged convicted. The inaccurate descriptions of the charges in the judgments constituted, at the most, mere clerical errors correctible at any time by the trial court. Rule 36, Federal Rules of Criminal Procedure; *Hill* v. *Wampler*, 298 U.S. 460, 464; *Tseung Chu* v. *Cornell*, 247 F. 2d 929, 932 (C.A. 9th).

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On Petition for A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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REPLY TO RESPONDENT'S ARGUMENT

The irreconcilable conflict upon which Petitioners rely as a basis for certiorari was not resolved by this Court in the Robinson case.

The Government's brief in opposition serves only to emphasize the compelling reasons why this petition for a writ of certiorari should be granted. Existence of the conflict is expressly conceded by the Government, Br. 7:

> "It is true that the Tenth Circuit's decisions in *Lujan v. United States*, 204 F. 2d 171, and *Smith v. United States*, 273 F. 2d 462, certiorari denied, June 27, 1960, cannot be reconciled with the decision below or with the decisions of the other courts of appeals . . ."

Furthermore, the Government concedes *sub silentio* that the conflict concerns an issue of extreme importance in the administration of the Federal Rules of Criminal Procedure.

As its sole ground for opposing certiorari, the Government points to this Court's decision in *United States* v. *Robinson*, 361 U. S. 220 (Jan. 11, 1960), arguing that "for all practical purposes" it has resolved the conflict (Br. 9). Its argument is manifestly untenable. The *Robinson* case presented an issue wholly different from the issue in this case. Under the facts in *Robinson*, by any construction, there was no doubt that the time for filing notice of appeal prescribed by Rule 37(a)(2)* had expired — the only question was whether the time could be extended *after* it had expired, by virtue of Rule 45(b). The decision turned on a construction of Rule 45(b), rather than of Rule 37(a)(2). The narrow scope of the *Robinson* decision was set out in the opinion, 361 U. S. at 222:

> "The *single question* presented is whether the filing of a notice of appeal in a criminal case *after* expiration of the time prescribed in Rule 37(a)(2) confers jurisdiction of the appeal upon the Court of Appeals if the District Court, proceeding under Rule 45(b), has found that the late filing of the notice of appeal was the result of excusable neglect."†

The Government also relied upon the *Robinson* case in support of its motion to dismiss the appeal in the Court of Appeals (R. 660). However, that case was neither mentioned nor cited in the majority opinion of the court below (Pt. 29-40; R. 696-709) — this further demonstrates that the *Robinson* case is not pertinent to the issue presented to

---

* All references to Rules are to Federal Rules of Criminal Procedure.

† Indications of emphasis throughout this brief have been supplied.

this Court. The language of this Court in the *Robinson* opinion quoted by the Government, Br. 8, has no conceivable bearing on this case — even when taken out of context.

To the extent that the *Robinson* decision fairly *may* be said to be relevant to the present inquiry, it supports *Petitioners'* contention that the court below erred in dismissing the appeal. In *Robinson*, this Court held that Rule 45(b) should be construed in accordance with the "plain meaning" of its "plain words," 361 U.S. at 224, 229 — which is precisely the contention of Petitioners with respect to Rule 37(a)(2).

If any decision of this Court is decisive, it is not *Robinson*, but *Sullivan* v. *United States*, 348 U.S. 170 (1954), which was pointed out in our petition, p. 9, but is not even mentioned in the Government's brief. *Sullivan* presented jurisdictional facts which were identical to those present in this case, and this Court — as well as the Court of Appeals — exercised jurisdiction over the appeal.

The Government's argument, Br. 8, that "*Lujan* and *Smith* cannot be deemed to have continuing vitality and probably will be overruled by the Tenth Circuit if the issue should again arise," is preposterous. *Smith* was heard by all of the circuit judges of the Tenth Circuit (save senior judges) sitting *en banc*. These five judges *unanimously* held that the *Lujan* decision should be followed — not only on grounds of *stare decisis*, but because it was correct — stating, 273 F. 2d at 465:

> " . . . It appears to us that the provisions of Rule 37(a)(2) are clear and unambiguous and can be changed only by the rule-making authority . . . "

Is it not the height of wishful thinking to speculate that the Tenth Circuit would overrule two unanimous, thoroughly-considered, well-reasoned, clearly correct and fair de-

cisions — and reduce Rule 37(a)(2) to a virtual trap — without a square decision from this Court?

If speculation were in order, Petitioners would submit that the Government's real reason for opposing certiorari is a premonition that this Court will adopt the obvious and fair Rule 37(a)(2) construction of *Smith* and *Lujan*, — rather than the tortured interpretation of the court below — and will reverse these improper convictions.

CONCLUSION

For the reasons stated therein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 238

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

H. A. LOTT, LEE BLOCKER AND LORN D. FRAZIER,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of the Court of Appeals (R. 107-116) is reported at 280 F. 2d 24.

JURISDICTION

The judgment of the Court of Appeals was entered on June 20, 1960. The petition was filed on July 15, 1960, and was granted on October 10, 1960. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

This case involves U.S. Const. amends. V, VI; Int. Rev. Code of 1939, ch. 1, §§145(a), 145(b), 53 Stat. 62, as amended, 57 Stat. 144; Int. Rev. Code of 1954, ch. 75, §§7201, 7203, 7207, 68A Stat. 851, 853; Conspiracy Act, 62 Stat. 701, 18 U.S.C. §371; Act of June 25, 1948, 62 Stat. 967, as amended, 63 Stat. 105, 28 U.S.C. §2255; Fed. R. Crim. P. 2, 7(c), 11, 12(b)(2), 31(c), 32, 34, 35, 36, 37(a), 45(b). The foregoing constitutional provisions, statutes and rules are printed in the Appendix, *infra*, p. 57.

QUESTIONS PRESENTED

1. Whether a notice of appeal in a criminal case was timely filed under Rule 37(a)(2), Federal Rules of Criminal Procedure, wherein:

   (a) The notice of appeal was filed within 10 days after entry of the order denying a motion in arrest of judgment.

   (b) The motion in arrest of judgment was filed within 5 days after entry of the judgment.

   (c) A plea of *nolo contendere* was entered more than 10 days before the motion in arrest of judgment was filed.

2. Whether a short-form indictment purporting to charge individuals with attempting to evade corporate income taxes, and conspiracy to do so, is sufficient wherein:

   (a) The indictment does not charge that there was a deficiency in the payment of income taxes by the corporation.

   (b) The indictment does not charge that the accused had knowledge of any tax deficiency.

   (c) The indictment does not charge what part the accused individually had in the alleged attempt to evade corporate income taxes.

(d) The conspiracy count of the indictment does not charge all the basic elements of the substantive offense of attempted evasion of corporate income taxes.

3. Whether the District Court lost jurisdiction to convict Petitioners upon their pleas of *nolo contendere* and impose prison sentences wherein:

(a) After acceptance of the pleas of *nolo contendere* the District Court deferred sentencing and proceeded to hear a lengthy trial of other persons accused in the indictment.

(b) On the day of sentencing Petitioners the District Court obviously relied upon evidence adduced at the trial of the other persons accused in the indictment.

4. Whether imposition of prisn sentences for felony offenses (in excess of one year) was beyond the jurisdiction of the District Court wherein the written judgments adjudged that Petitioners were convicted of the misdemeanor offenses of "filing false and fraudulent corporate income tax returns" and "conspiring to file false and fraudulent corporate income tax returns."

STATEMENT OF THE CASE

The three Petitioners were convicted, fined and sentenced to imprisonment by the United States District Court for the Southern District of Texas, Houston Division, on the basis of a Federal grand jury indictment (R. 1-10) which purports to charge them, along with Richard A. Farnsworth, Sr., and Alan Farnsworth, in five counts. Counts 1 through 4 purport to charge a willful attempt to evade and defeat taxes of Farnsworth & Chambers Company, Inc. (a Texas corporation) for the years 1951 through 1954, in violation of Section 145(b) of the Internal Revenue Code of 1939 (Counts 1-3), and Section 7201 of the Internal Revenue Code of 1954

(Count 4). Count 5 purports to charge a conspiracy to willfully attempt to evade and defeat taxes of Farnsworth & Chambers Company, Inc., for the same years, in violation of 18 U.S.C. §371. Petitioners were employee-officers and minor stockholders (approximately 7% among them) of Farnsworth & Chambers Company, Inc. (R. 52; R.B. 111).[1] The controlling executives and major stockholders of the corporation were Dunbar N. Chambers (now deceased) and Richard A. Farnsworth, Sr. and his son, who owned approximately 74% of the stock among them (R.B. 111).

Following return of the indictment, Petitioners were arraigned on April 24, 1958, and pleaded "not guilty" (R. 11). Thereafter, all three Petitioners filed motions for bill of particulars and for severance from the other defendants and separate trials, and two Petitioners filed a motion to dismiss the indictment (R. 15). All of these motions were denied by the District Court (R. 15). Before action was taken on the motions the Government had voluntarily filed a "bill of particulars" (R. 11) and in response thereto two Petitioners filed a motion for supplemental bill of particulars (R. 13), which was also denied (R. 15).

After denial of all their pre-trial motions, Petitioners requested permission to be rearraigned for the purpose of entering pleas of *nolo contendere* (R. 16, 29-30). Acceptance of the pleas was vigorously opposed by the Government (R. 16-17, 30), but they were accepted by the District Court. The pleas of *nolo contendere* were entered on March 17, 1959, by Petitioners Blocker and Frazier (R. 29), and on March 20, 1959, by Petitioner Lott (R. 41).

After accepting such pleas, the District Court deferred sentencing and the same judge presided at the trial of

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[1] Pursuant to stipulation filed herein, a few references will be made to portions of the record which were not reprinted, in order to support certain items of background information. Such references will be designated "R.B."

Richard A. Farnsworth, Sr., and Alan Farnsworth under the indictment (R. 107). This jury trial commenced on April 6, 1959, and lasted until June 9, 1959 — consuming nearly 10 weeks (R. 59). Alan Farnsworth was acquitted on all counts and the jury was unable to agree upon a verdict as to Richard A. Farnsworth, Sr. (R. 107).

On June 19, 1959, following the Farnsworth trial, the District Court (with the same judge still presiding) called Petitioners before it for sentencing (R. 41). During the sentencing proceedings repeated references were made to evidence adduced at the Farnsworth trial (R. 42, 46, 51, 59). Petitioners were orally sentenced to serve terms of imprisonment on each count (to run concurrently), 3 years in the case of Blocker and 2 years each in the cases of Lott and Frazier, and each of the three was fined $20,000 (R. 60-61). The written judgments were filed on June 22, 1959; they adjudge Petitioners guilty of "filing false and fraudulent corporate income tax returns" and "conspiring to file false and fraudulent corporate income tax returns," although they refer to the statutes set out in the indictment (R. 61-66).

On June 23, 1959, Petitioner Lott filed a motion denominated "motion in arrest of judgment", which prayed "that the judgment and sentence with respect to him be arrested and set aside, that the indictment against him be dismissed, and that he be granted such other relief as justice may demand" (R. 66-67). On the same day Petitioners Blocker and Frazier filed a "motion in arrest of judgment" praying for identical relief (R. 68-70). Orders denying the motions in arrest of judgment were entered on July 13, 1959 (R. 72). Petitioners filed motions for reduction and suspension of sentence or probation (R. 72, 83) which were also denied (R. 75-76). Petitioner Lott filed notice of appeal to the Court of Appeals on July 15, 1959 (R. 74). Petitioners Blocker and Frazier filed notice of appeal on July 17, 1959 (R. 80).

The divided Court of Appeals below entered judgment dismissing the appeals for want of jurisdiction on June 20, 1960, upon the ground that its jurisdiction had not been invoked by timely notices of appeal (R. 116, 117). Questions going to the merits of the appeals were not reached (R. 108). The majority held that the motions in arrest of judgment — filed well within 5 days after entry of the judgments — were not effective to toll the time for giving notice of appeal under Rule 37(a)(2)[2] because such motions were not filed within 5 days after entry of the *nolo contendere* pleas. Acceptance of the *nolo contendere* pleas was construed to be a "determination of guilt" within the meaning of Rule 34.

SUMMARY OF ARGUMENT

I.

1. Under the plain terms of Rule 37(a)(2) the notices of appeal were timely filed. It explicitly provides that, if a motion in arrest of judgment has been made within the 10-day period following entry of judgment, appeal from the judgment may be taken within 10 days after entry of the order denying the motion. The instant appeals were taken strictly in accordance with Rule 37(a)(2), as follows:

June 19	Sentences pronounced (written judgments entered June 22).
June 23	Motions in arrest filed.
July 13	Orders denying motions entered.
July 15 & 17	Notices of appeal filed.

Rule 37(a)(2) does not require that a motion in arrest of judgment be filed within the time prescribed by Rule 34 in order to toll the time for appeal. Rule 34 has nothing to do with the time for appeal. Rule 37(a)(2) is headed up

[2] All references to Rules are to the Federal Rules of Criminal Procedure, unless otherwise stated.

"Time for Taking Appeal" and it is the only rule which bears upon the timeliness of an appeal. Justice requires that appellants in criminal cases be entitled to rely upon the unambiguous terms of Rule 37(a)(2). The decision below is wrong — it reduces the rule to a virtual trap. (Full argument, *infra*, pp. 11-16.)

2. Even if so required, the motions in arrest of judgment were timely filed under Rule 34. It states that motions in arrest shall be filed "within 5 days after determination of guilt." Although Petitioners pleaded *nolo contendere* on March 17 and 20, that was not a determination of guilt. There was no conceivable "determination of guilt" until June 19 when the judge found Petitioners guilty and pronounced sentence. Motions in arrest of judgment were filed well within 5 days thereafter, on June 23. The very word "determination" implies finality — the termination of a proceeding — and a case does not terminate until judgment is entered. *Nolo contendere* is a plea to the court that "I will not contest." It is not an admission of guilt and it cannot be deemed a "determination" of guilt. Under Rule 32(d) the *nolo contendere* pleas might have been withdrawn before sentence was imposed, so in no sense may such pleas be impressed with the finality of a "determination" of guilt. (Full argument, *infra*, pp. 17-20.)

3. In *Sullivan* v. *United States*, 212 F. 2d 125 (10 Cir. 1954), *aff'd* 348 U.S. 170 (1954), this Court and the Court of Appeals exercised jurisdiction over the appeal under jurisdictional facts virtually identical to those in this case. Presumably, it was determined that jurisdiction was present. (Full argument, *infra*, p. 21.)

4. Rule 12(b)(2) provides that "lack of jurisdiction or the failure of the indictment or information to charge an

offense shall be noticed by the court at any time during the pendency of the proceeding." Petitioners' alternative position is that the "motions in arrest of judgment" qualified as motions under Rule 12(b)(2), and should be so regarded. It is clear that they were timely filed during the "pendency of the proceeding." The notices of appeal were filed well within 10 days following entry of the order denying the motions, and fairness requires that the appeals be regarded as having been taken from the denial of such motions. (Full argument, *infra*, pp. 21-23.)

5. In the further alternative, Petitioners contend that the "motions in arrest of judgment" should be treated as motions to vacate sentences under 28 U.S.C. §2255. *Marteney* v. *United States*, 216 F. 2d 760 (10 Cir. 1954), is an exact precedent for such treatment. If there were no timely appeals from the judgments, Petitioners' freedom under bail would be unauthorized and they should be regarded as "in custody" for purposes of §2255. The notices of appeal were filed well within 10 days after denial of the constructive §2255 motions and thus were timely. (Full argument, *infra*, pp. 23-25.)

II.

1. The indictment is not sufficient to charge the offenses of willfully attempting to evade corporate income taxes and conspiracy to do so. In order to be valid an indictment must directly and expressly charge every element of the offense — this is a fundamental principle. A charge in the language of the statute is not sufficient when the statute omits essential elements of the offense. It is well established that two essential elements of the offense of attempted tax evasion defined by §145(b), I.R.C. 1939, and §7201, I.R.C. 1954, are (1) existence of a tax deficiency (this is the *corpus delicti*), and (2) knowledge of the exis-

tence of a tax deficiency. These basic elements of the offense do not appear in the statute and they are not directly and expressly charged in the indictment. Since the law clearly requires that such elements of the offense be directly charged, the indictment is fatally defective. Indeed, it is very difficult to see how these elements are charged at all, by implication or otherwise. A charge by implication would not salvage the indictment. Such elements could not possibly be said to be charged in the conspiracy count — not even by implication. An indictment for conspiracy is required to set out the essential elements of the substantive offense which is the alleged object of the conspiracy. All counts of this short-form indictment fail to charge offenses against the United States. It should be dismissed. (Full argument, *infra*, pp. 25-34.)

2. In addition, under the circumstances, the indictment fails to inform the accused of the "nature and cause of the accusation" within the meaning of the Sixth Amendment. Petitioners are accused of attempting to evade taxes of a rather large corporation of which they were employees and very minor stockholders. The vague and general allegations of the indictment are grossly insufficient, as a practical matter, to inform Petitioners of the charge or enable them to prepare to defend against it. It is not shown how any of the acts alleged might have caused the corporation to underpay its taxes. No facts are set out which would prove the recited falsity of the corporate tax returns. Five individuals are accused in the same indictment, but no one accused is informed as to the charges against him individually. While such a short-form indictment might possibly be deemed sufficient to charge *individuals* with attempting to evade *their own personal* income taxes, it is manifestly insufficient to reasonably charge employees of varying responsibilities with attempting to defeat taxes imposed upon a *corporation*. (Full argument, *infra*, pp. 34-38.)

III.

Petitioners submit that the record shows that they were convicted and sentenced on the basis of evidence adduced at the 10-week long trial of the Farnsworths, who were jointly indicted with Petitioners. This trial occurred during the 3 months following entry of the *nolo contendere* pleas by Petitioners and preceding pronouncement of judgment and sentences. Petitioners were actually tried *in absentia*, without benefit of cross-examination or rebuttal evidence, and without a jury. The convictions and sentences were obtained in a manner which departed sharply from normal and customary procedure.

Under the circumstances there was an "unreasonable delay" in imposing sentence, in violation of Rule 32(a). Furthermore, the conduct of the District Court in making an adjudication of guilt on the basis of the Farnsworth trial evidence constituted a rejection of the pleas of *nolo contendere*, as a matter of law. See *Tucker* v. *United States*, 196 Fed. 260, 267-268 (7 Cir. 1912). Although there is considerable doubt and conflict as to the meaning and effect of *nolo contendere*, its historical origin and the studied decisions show that it is not a plea to the indictment but is an agreement between the court and the accused, authorizing judgment and sentence, based upon public policy considerations. The plea does not authorize a trial by the court sitting without a jury. In this case the plea was abused and, in effect, rejected. No plea being outstanding, the District Court had no jurisdiction to convict and sentence Petitioners as it did. At the very least, Petitioners should be permitted to replead to the indictment. (Full argument, *infra*, pp. 39-53.)

IV.

The indictment purported to charge Petitioners with the felonies of willfully attempting to evade *corporate* taxes, and conspiracy to do so, and the District Court orally pronounced that they were guilty of such offenses. However, the *written judgments* adjudge Petitioners guilty of "filing false and fraudulent corporate income tax returns" and "conspiring to file false and fraudulent corporate income tax returns." The language first quoted describes the misdemeanor offense proscribed by §7203 and 7207, I.R.C. 1954, and 145(a), I.R.C. 1939. These misdemeanors appear to be lesser offenses included within the felony charges. Under 18 U.S.C. §371, conspiracy to commit a misdemeanor subjects the offender to no more than the maximum punishment provided for the misdemeanor. Therefore, under the written judgments, it seems that Petitioners stand convicted of misdemeanor offenses and that the sentences are excessive to the extent that they exceed imprisonment for 1 year. (Full argument, *infra*, pp. 53-55.)

ARGUMENT

I.

The notices of appeal were timely filed under Rule 37(a)(2) because:

1. The notices of appeal were filed within the time limits plainly prescribed by Rule 37(a)(2).
2. Even if so required, the motions in arrest of judgment were timely filed under Rule 34.
3. In *Sullivan* v. *United States* this Court exercised jurisdiction under facts identical to these.
4. In the alternative, the motions in arrest of judgment should be construed as motions under Rule 12(b)(2), and the appeals should be regarded as having been taken from the denial of such motions.

5. In the further alternative, the motions in arrest of judgment should be construed as motions to vacate sentences under 28 U.S.C. §2255, and the appeals should be regarded as having been taken from the denial of such motions.

1. The notices of appeal were filed within the time limits plainly prescribed by Rule 37(a)(2).

Since several dates are of critical importance in considering this case, they are set out below in chronological order:

March 17, 1959	Rearraignment and entry of *nolo contendere* pleas by Petitioners Blocker and Frazier (R. 29).
March 20, 1959	Rearraignment and entry of *nolo contendere* plea by Petitioner Lott (R. 41).
June 19, 1959	Sentencing of all Petitioners in open court (R. 60-61).
June 22, 1959	Judgment and commitment as to each Petitioner filed (R. 61-66).
June 23, 1959	Motions in arrest of judgment filed by all Petitioners (R. 66, 68).
July 13, 1959	Orders denying the motions in arrest of judgment of all Petitioners entered (R. 72).
July 15, 1959	Notice of appeal filed by Petitioner Lott (R. 74).
July 17, 1959	Notice of appeal filed by Petitioners Blocker and Frazier (R. 80).

Petitioners' primary contention is that the notices of appeal were timely filed because they were filed within the time prescribed by the clear, explicit and unambiguous terms of Rule 37(a)(2). That rule provides in pertinent part as follows:

> "(2) **Time for Taking Appeal.** An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. . . ."

The undisputed record shows (1) that Petitioners filed motions in arrest of judgment well "within the 10-day period" following entry of the judgment, and (2) that Petitioners filed their notices of appeal well "within 10 days after entry of the order[s] denying the motion[s]" in arrest of judgment. See table above. Therefore, under the plain terms of Rule 37(a)(2) the notices of appeal were timely filed. However, the court below held that the motions in arrest of judgment were not timely filed under *Rule 34* and — for that reason — held that the longer time for appeal provided in Rule 37(a)(2) was not applicable. In so holding, the court below went directly contrary to the decisions in *Lujan* v. *United States*, 204 F. 2d 171 (10 Cir. 1953), and *Smith* v. *United States*, 273 F. 2d 462 (10 Cir. 1959), *cert. den.* 363 U.S. 846. It relied upon the holding in *United States* v. *Bertone*, 249 F. 2d 156 (3 Cir. 1957), and dictum in other cases.[3]

The real question is: Does Rule 37(a)(2) mean what it plainly says? It explicitly states that the longer time for appeal applies "if a motion for a new trial or in arrest of judgment has been made within the 10-day period" following entry of judgment. Rule 37(a)(2) does not state that

[3] O'Neal v. United States, 264 F. 2d 809, vacated 272 F. 2d 412 (5 Cir. 1959); Marion v. United States, 171 F. 2d 185 (9 Cir. 1948), cert. den. 337 U.S. 944. *See also*, Drown v. United States, 198 F. 2d 999 (9 Cir. 1952), cert. den. 344 U.S. 920; Pugh v. United States, 197 F. 2d 509 (9 Cir. 1952); Godwin v. United States, 185 F. 2d 411 (8 Cir. 1950).

the motion must be timely under Rule 34, or have any other quality — it requires only "*a motion* . . . in arrest of judgment." (Emphasis supplied.)

We submit that the court below clearly erred in looking to the timeliness of the motions in arrest of judgment under Rule 34. That rule does not pretend to exert any impact upon the time for filing of the notice of appeal. Rule 37 — not 34 — relates to the time and manner for the taking of an appeal. Significantly, Rule 37 does not refer to a motion in arrest of judgment filed "within 5 days after determination of guilt" under Rule 34. It fails to contain any language indicating even by implication that it is limited to a motion seasonably filed under Rule 34. The sweep of Rule 37(a)(2) is to provide without condition or qualification that an appeal by a defendant may be taken within 10 days after entry of the judgment, and further that if a motion in arrest of judgment has been made within the 10-day period then an appeal from the judgment may be taken within 10 days after entry of the order denying the motion.

The decision below reduces Rule 37(a)(2) to a virtual trap. We respectfully submit that defendants in criminal cases and the bar should be able to rely upon the plain terms of the rule entitled "Time For Taking Appeal"— Rule 37(a)(2) — in order to determine the time for filing notice of appeal. Reference to other rules having nothing to do with the time for appeal should not be required. This is the only construction which is in accordance with the command of Rule 2 that:

> "These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

(a) The history of Rule 37(a)(2) shows that the construction adopted by the court below is erroneous.

It is interesting to note that the construction adopted by the court below is in accordance with the terms of the Criminal Appeals Rules of 1933, 292 U.S. 661, which were superseded by the Federal Rules of Criminal Procedure. Old rule III — the counterpart of present Rule 37(a)(2) — provided in pertinent part as follows:

> "III. *Appeals.* An appeal shall be taken within five (5) days after entry of judgment of conviction, except that where a motion for a new trial has been made *within the time specified in subdivision (2) of Rule II*, the appeal may be taken within five (5) days after entry of the order denying the motion." 292 U.S. at 662. (Emphasis supplied.)

Old rule II(2) was the counterpart of present Rules 33 and 34.

What is now Rule 37(a)(2) underwent several draft changes before adoption. The First Preliminary Draft was similar to old rule III, providing as follows:

> "**(2) Time for Taking Appeal.** An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial has been made *seasonably*, an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion . . . ."[4]

The same is true with respect to the Second Preliminary Draft, which provided as follows:

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[4] Federal Rules of Criminal Procedure, Preliminary Draft, with Notes and Forms, Prepared by the Advisory Committee on Rules of Criminal Procedure, United States Government Printing Office, 1943, Appeal Rule then No. 35(a)(2), p. 152. (Emphasis supplied.)

"(2) **Time for Taking Appeal.** An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial is *then pending* an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion . . . ."[5]

It will be noted that neither old rule III, the First Preliminary Draft nor the Second Preliminary Draft provided that a motion in arrest of judgment would toll the time to file notice of appeal — the time was tolled only by a motion for a new trial. Not until the third and final draft was it provided that a motion in arrest of judgment would toll the time for appeal:

"(2) **Time for Taking Appeal.** An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion . . . ."[6]

More important, for present purposes, in the final draft the language of old rule III and the preliminary drafts indicating that a motion must be *seasonably* filed in order to toll the appeal time was deleted. This seems almost conclusively to show a deliberate intention (1) to eliminate any requirement that a motion for a new trial be timely filed under Rule 33 in order to toll the time for appeal under Rule 37(a)(2), and (2) not to require that a motion in arrest of judgment be timely filed under Rule 34 in order to toll the time for appeal under Rule 37(a)(2).

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[5] Federal Rules of Criminal Procedure, Second Preliminary Draft, with Notes and Forms, Prepared by the Advisory Committee on Rules of Criminal Procedure, United States Government Printing Office, February 1944, Appeal Rule then No. 39(a)(2), p. 135. (Emphasis supplied.)

[6] Federal Rules of Criminal Procedure, Report of the Advisory Committee on Rules of Criminal Procedure, United States Government Printing Office, June 1944, Appeal Rule then No. 39(a)(2), p. 37.

2. Even if so required, the motions in arrest of judgment were timely filed under Rule 34:

(a) Entry of the pleas of nolo contendere did not constitute a "determination of guilt" within the meaning of Rule 34.

The court below held that under Rule 34 a "determination of guilt" was made when Petitioners' pleas of *nolo contendere* were tendered to and accepted by the court (R. 112). This, we believe, was error — neither the rule nor reason supports such result. This is a case of first impression.

The pertinent part of Rule 34 now reads as follows:

> ". . . The motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the court may fix during the 5-day period."

Its history offers no support for the decision below. Prior to adoption of the Federal Rules of Criminal Procedure, Rule II(2) of the Criminal Appeals Rules of 1933, 292 U.S. 661, 662, the forerunner of Rule 34, provided:

> "(2) Save as provided in subdivision (3) of this Rule, motions in arrest of judgment, or for a new trial, shall be made within three (3) days after verdict or finding of guilt."

The present Rule 34 underwent several draft changes before adoption. The First Preliminary Draft provided in pertinent part as follows:

> ". . . The motion in arrest of judgment shall be made within 3 days after verdict or finding of guilt or within such further time as the court may fix during the 3-day period."[7]

[7] Federal Rules of Criminal Procedure, Preliminary Draft, with Notes and Forms, Prepared by the Advisory Committee on Rules of Criminal Procedure, United States Government Printing Office, 1943, Appeal Rule then No. 31(d), p. 134.

The Second Preliminary Draft is the same except the time is changed from 3 to 5 days:

> ". . . The motion in arrest of judgment shall be made within 5 days after verdict or finding of guilt or within such further time as the court may fix during the 5-day period."[8]

Not until the third and final draft was the phrase "after verdict or finding of guilt" changed to "after determination of guilt":

> ". . . The motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the court may fix during the 5-day period."[9]

"Determination", in legal parlance, means, "The decision of a court of justice. It implies an ending or finality, the ending of a controversy or suit." Black, *Law Dictionary* 536 (4th ed. 1951). A criminal action is terminated by the final judgment entered. *Phillips* v. *United States*, 212 F. 2d 327, 335 (8 Cir. 1954). In this case no action which could reasonably be construed as either a "finding of guilt" or a "determination of guilt" was taken until June 19, 1959, when the court pronounced its judgment, stating (R. 60):

> "I have found each [defendant] guilty of the felonies as contained in the Grand Jury indictment."

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[8] Federal Rules of Criminal Procedure, Second Preliminary Draft, with Notes and Forms, Prepared by the Advisory Committee on Rules of Criminal Procedure, United States Government Printing Office. February 1944, Appeal Rule then No. 36, p. 131.

[9] Federal Rules of Criminal Procedure, Report of the Advisory Committee on Rules of Criminal Procedure, United States Government Printing Office. June 1944, Appeal Rule then No. 36, p. 35.

The written judgments were entered June 22 (R. 61-66). Whether the "determination of guilt" be regarded as having taken place on June 19 or on June 22, Petitioners' motions to arrest judgment were filed within the 5 days prescribed by Rule 34, since they were filed on June 23 (R. 66, 68).

Acceptance of a plea of *nolo contendere* should not constitute a determination of guilt. As demonstrated under Point III (*infra*, p. 39), *nolo contendere* is not in essence or historical development a plea to the indictment at all, but rather a plea to the court — an offer not to contend with the charges brought by the Government. As this Court held in *United States* v. *Norris*, 281 U.S. 619, 623 (1930), so long as the plea of *nolo contendere* remains of record no issue of fact exists or can be made to exist under the indictment. Certainly the issue of guilt is one arising under the indictment. But since technically the plea of *nolo contendere* is not a plea to the indictment, there is no basis for saying that acceptance of that plea constitutes a "determination of guilt." To the contrary, the only "determination" involved in the court's acceptance of a defendant's plea of *nolo contendere* is a determination that the demands of public policy and the requirements of justice can be satisfied by disposition of the case without contest or adjudication of issues arising under the indictment. *United States* v. *Standard Ultramarine & Color Co.*, 137 F. Supp. 167 (S.D. N.Y. 1955).

We submit that the only logical construction of the rules as a whole is to interpret the phrase "determination of guilt" as used in Rule 34 to mean "entry of judgment" in a *nolo contendere* case. Any other construction leads to absurd results. Under the holding of the court below, a defendant would be put in the ridiculous position of having to move to arrest a judgment not yet in existence, and having to file an appeal when the judgment, ultimately entered, might be entirely acceptable to him. It certainly would seem illogical

to regard entry of the plea as a determination in view of the fact that, with the consent of the court, the plea might be withdrawn at any time before sentence is imposed. Fed. R. Crim. P. 32(d).

Under the holding below, what should, or what could Petitioners have done? Would it have been reasonable for them to have filed their motions in arrest of judgment by March 22, 1959 (5 days after entry of *nolo contendere* pleas), when they were waiting to be sentenced 3 months later? Suppose they had done so, and the motions had been promptly denied. Would they have been required by Rule 37(a)(2) to file notice of appeal within 10 days thereafter, still nearly 3 months before entry of judgment? Or, suppose that the motion to arrest judgment was carried along and not overruled until after entry of judgment. Then, although the motion was pending, it would not have been filed "within the 10-day period" after entry of judgment according to the terms of Rule 37(a)(2), and Petitioners would have been in the incongruous position of having to appeal from the judgment (within 10 days after its entry) although the motion might have been granted later and the judgment arrested.

To require a defendant who is awaiting sentence after a plea of *nolo contendere* to move in arrest of judgment within 5 days after entry of the plea, is to deny him the right to so move. In view of the pre-sentence investigation procedure, and as a matter of common experience, entry of the plea will practically always precede the sentencing by more than 5 days. The fair and logical construction of the rules is that the "determination of guilt" does not occur until judgment is entered. Certainly this should be so for the purpose of determining the timeliness of appeals. The holding of the court below reduces Rule 34 to a virtual trap in a *nolo contendere* case.

3. In Sullivan v. United States this Court exercised jurisdiction under facts identical to these.

Jurisdictional facts identical in all material respects to those in the instant case were presented in *Sullivan* v. *United States*, 212 F. 2d 125 (10 Cir. 1954), *aff'd* 348 U.S. 170 (1954). The defendant entered a plea of *nolo contendere* on April 8, 1953, was sentenced on May 26, and filed a motion in arrest of judgment on May 29; the motion in arrest of judgment was denied after June 23, and within 10 days thereafter the notice of appeal was filed. Both the Court of Appeals for the Tenth Circuit and this Court exercised jurisdiction over the appeal. Presumably, the Court of Appeals determined that it had jurisdiction, in accordance with its previous decision in *Lujan* v. *United States*, 204 F. 2d 171 (10 Cir. 1953). It also seems fair to presume that this Court considered its jurisdiction and determined that it had jurisdiction — under the plain language of Rule 37(a)(2). We respectfully submit that the same decision should be made in this case, on the basis of both the plain words of Rule 37(a)(2) and the precedent of *Sullivan*.

4. In the alternative, the motions in arrest of judgment should be construed as motions under Rule 12(b)(2), and the appeals should be regarded as having been taken from the denial of such motions.

Even if the court below were correct in its holding that the appeals from entry of the judgments were not timely taken, it nevertheless had jurisdiction to notice and relieve the failure of the indictment to charge an offense and the consequent lack of jurisdiction in the District Court to enter judgment. Rule 12(b)(2) provides in part as follows:

"... Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be

noticed by the court at any time during the pendency of the proceeding."

The judgments were entered on June 22, 1959 (R. 61-66). The next day Petitioners filed motions denominated "motion in arrest of judgment" (R. 66, 68). Unquestionably, these motions were filed "during the pendency of the proceeding" within the meaning of Rule 12(b)(2) since — by any construction — the time to file notice of appeal could not have expired until 9 days after they were filed. Furthermore, the motions alleged as grounds that "The indictment does not state facts sufficient to constitute an offense against the United States" (R. 66, 68), coming precisely within the terms of Rule 12(b)(2). Thus, it is clear that the District Court had jurisdiction to consider and to grant the motions under Rule 12(b)(2) — even if they were not timely under Rule 34. *Finn* v. *United States*, 256 F. 2d 304, 306 (4 Cir. 1958); *United States* v. *Holmes*, 110 F. Supp. 233, 234 (S.D. Tex. 1953); see *Hotch v. United States*, 208 F. 2d 244, 250 (9 Cir. 1953).

Orders denying the "motions in arrest of judgment" were entered on July 13, 1959 (R. 72). Since the judgments had previously been entered (R. 61-66), it seems clear beyond doubt that the orders denying the motions were appealable. Cf. *Ekberg* v. *United States*, 167 F. 2d 380, 384 (1 Cir. 1948); *United States* v. *Quon*, 241 F. 2d 161, 163 (2 Cir. 1957), *cert. den.* 354 U.S. 913; *Sutton* v. *United States*, 157 F. 2d 661, 668 (5 Cir. 1946). Notices of appeal were filed well within 10 days after entry of the orders (R. 74, 80). In fairness and justice, the appeals should be regarded as having been taken from the orders denying the motions — even though the notices of appeal did not expressly refer to the orders.

A holding that the notices of appeal were ineffective to constitute appeals from the orders denying the "motions in arrest of judgment" would go directly contrary to the

spirit of the Federal Rules of Criminal Procedure — as intended, construed and applied. In a number of instances, documents which did not even purport to be notices of appeal have been held to be effective as such.[10]

In summary, we respectfully submit, in the alternative, that the "motions in arrest of judgment" should be construed as motions under Rule 12(b)(2) and the appeals should be regarded as having been taken from the orders denying the motions as so construed. Our position in this regard was apparently misconstrued by the court below. In the brief paragraph of its opinion which was apparently intended to deal with this point (R. 113-114), it did not even refer to Rule 12(b)(2), the basis for our contention.

5. In the further alternative, the motions in arrest of judgment should be construed as motions to vacate sentences under 28 U.S.C. §2255, and the appeals should be regarded as having been taken from the denial of such motions.

If the court below were correct in holding that there was no timely appeal from the judgments, it should have reached the merits by viewing the "motions in arrest of judgment" as motions to vacate sentences under 28 U.S.C. §2255. These motions expressly prayed that the sentences be set aside, and also requested "such other relief as justice may demand" (R. 67, 70). An exact precedent for such treatment is found in *Marteney* v. *United States*, 216 F. 2d 760 (10 Cir. 1954). In that case the appellants filed motions to arrest judgment after judgment and sentence, but it was held that

[10] *E.g.*, O'Neal v. United States, 272 F. 2d 412 (5 Cir. 1959) — appeal bond; Black v. United States, 269 F. 2d 38 (9 Cir. 1959), cert. den. 361 U.S. 538 — application for leave to appeal in forma pauperis; Jordan v. United States, 233 F. 2d 362 (D.C. Cir. 1956), rev'd mem. other grounds 352 U.S. 904 (1956) — petition for writ of mandamus.

the motions were filed too late under Rule 34. However, the motions to arrest judgment were treated as motions to vacate under 28 U.S.C. §2255, and the judgments were reversed because of the failure of the indictment to state an offense. The rationale is succinctly set out in the opinion of the Court of Appeals, 216 F. 2d at 762:

> "The 'motions in arrest of judgment', having been filed more than five days after determination of guilt, were untimely under Rule 34 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., and the government takes the preliminary position that the trial court was without authority to treat the pleadings as motions to vacate under Section 2255 for the purpose of considering the legal questions raised by the motions. Section 2255 specifically authorizes 'A prisoner in custody under sentence of a court * * * claiming * * * that the court was without jurisdiction to impose such sentence * * * may move the court which imposed the sentence to vacate, set aside or correct the sentence * * * at any time.' Treated as motions to vacate, the pleadings were undoubtedly timely to challenge the legal sufficiency of the counts in the indictment to state a federal offense. Having in mind that it is the content of the pleadings and not the label which determines their nature and effect, we can see no impropriety in the court's treatment of the pleadings as motions to vacate under Section 2255."

Accord, *Finn* v. *United States*, 256 F. 2d 304 (4 Cir. 1958).

It appears that a person must be "in custody under sentence of a court" in order to be entitled to relief under 28 U.S.C. §2255.[11] However, if it were determined that no timely appeal was taken Petitioners would not be entitled to be at liberty on bail, and they should be regarded as "in

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[11] See concurring opinion of a majority of this Court in Heflin v. United States, 358 U.S. 415, 420-422 (1959).

custody" for purposes of Section 2255. *Black* v. *United States*, 269 F. 2d 38, 41 (9 Cir. 1959), *cert. den.* 361 U.S. 938. Furthermore, in any event it would be well for this Court to review the merits under Section 2255 in order to avoid circuity of actions, as suggested by the court below (R. 116). Cf. *Heflin* v. *United States*, 358 U.S. 415, 418 n.7 (1959).

Although it is difficult to determine the exact ground upon which the court below rejected Petitioners' request for relief under 28 U.S.C. §2255, in the alternative, it appears that the controlling factor was the failure of the notices of appeal (R. 74, 80) to expressly refer to the orders denying the "motions in arrest of judgment." As we pointed out under the previous point (*supra*, pp. 22-23), this represents a hyper-technical construction of Rule 37(a)(1) which is wholly out of harmony with the spirit of the Federal Rules of Criminal Procedure.

II.

The indictment is insufficient because:

1. The indictment does not charge all the basic elements of the offense of attempted tax evasion.
2. The indictment wholly fails to apprise the accused *employees* of "the nature and cause of the accusation" of attempted evasion of *corporate* income taxes within the meaning of the Sixth Amendment.

Introduction

While a number of decisions of the courts of appeals have upheld indictments for attempted income tax evasion,[12] some of which contained language similar to that appearing in the indictment here in question (R. 1-10), none of the cases found involved defendants accused only of attempting to evade taxes imposed upon a *corporation*.[13] Thus, such decisions are distinguishable. Furthermore, it appears that the courts of appeals erroneously assumed that indictments for attempted tax evasion are within the general rule that "an indictment or information in the language of a statute ordinarily is sufficient. . . ." *Babb* v. *United States*, 218 F. 2d 538, 539 (5 Cir. 1955). Quite to the contrary, such indictments are within the exception pertaining when the words of the statute do not contain all the essential elements of the offense. "[I]f the statute omits

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[12] Janko v. United States, 281 F. 2d 156 (8 Cir. 1960); United States v. Hoover, 233 F. 2d 870 (3 Cir. 1956), cert. den. 352 U.S. 840; Elwert v. United States, 231 F. 2d 928 (9 Cir. 1956); United States v. Tadio, 223 F. 2d 759 (2 Cir. 1955), cert. den. 350 U.S. 874; Samish v. United States, 223 F. 2d 358 (9 Cir. 1955), cert. den. 350 U.S. 848; Legatos v. United States, 222 F. 2d 678 (9 Cir. 1955); Gariepy v. United States, 220 F. 2d 252 (6 Cir. 1955), cert. den. 350 U.S. 825; Heasley v. United States, 218 F. 2d 86 (8 Cir. 1955), cert. den. 350 U. S. 882; Pollock v. United States, 202 F. 2d 281 (5 Cir. 1953), cert. den. 345 U.S. 993; Gariepy v. United States, 189 F. 2d 459 (6 Cir. 1951); United States v. Rosenblum, 176 F. 2d 321 (7 Cir. 1949), cert. den. 338 U.S. 893; Himmelfarb v. United States, 175 F. 2d 924 (9 Cir. 1949), cert. den. 338 U.S. 860; Cave v. United States, 159 F. 2d 464 (8 Cir. 1947), cert. den. 331 U.S. 847; Rose v. United States, 128 F. 2d 622 (10 Cir. 1942), cert. den. 317 U.S. 651; United States v. Skidmore, 123 F. 2d 604 (7 Cir. 1941), cert. den. 315 U.S. 800; Capone v. United States, 56 F. 2d 927 (7 Cir. 1932), cert. den. 287 U.S. 553. *Contra*, Anderson v. United States, 11 F. 2d 938 (7 Cir. 1926).

[13] In Tinkoff v. United States, 86 F. 2d 868 (7 Cir. 1936), cert. den. 301 U.S. 689, it appears that the only holding was that the Court of Appeals had no jurisdiction over the appeal, p. 875.

an essential element, the indictment must supply it with certainty." *Babb v. United States, supra.*

1. The indictment does not charge all the basic elements of the offense of attempted tax evasion.

Of course, an indictment is fatally defective if it does not set forth every element of the offense sought to be charged. *United States* v. *Debrow*, 346 U.S. 374, 376 (1953); *Hagner* v. *United States*, 285 U.S. 427, 431 (1932); *Pettibone* v. *United States*, 148 U.S. 197, 202 (1893). This is a constitutional requirement, not a mere technicality of pleading subject to change by statute, court rule or decision. *United States* v. *Cruikshank*, 92 U.S. 542, 557 (1876); *Asgill* v. *United States*, 60 F. 2d 780, 784 (4 Cir. 1932).

The principle that an indictment must charge every essential element of the offense is not affected by the Federal Rules of Criminal Procedure. Such requirement is expressly recognized in Rule 7(c), which states that "the indictment or the information shall be a plain, concise and definite written statement of the *essential facts* constituting the offense charged." (Emphasis supplied.) As succinctly held in *United States* v. *Calhoun*, 257 F. 2d 673, 680 (7 Cir. 1958):

> ". . . The core of this reversible error is the omission, not the class of omission. U.S. Const. Amend. VI. Rule 7, Federal Rules of Criminal Procedure, 18 U.S.C. is unavailing in this situation and the failure to challenge the indictment at the trial level is unimportant, on this record, because count 5 omitted an element of the offense. . . ."

Furthermore, every element must be set forth fully, directly and expressly, without any uncertainty or ambiguity. *Evans* v. *United States*, 153 U.S. 584, 587 (1894); *Orglas* v. *United States*, 236 F. 2d 392, 393 (9 Cir. 1956). This is particularly essential when, as in the present case,

the language of the statute does not contain all elements of the offense. *Meer* v. *United States*, 235 F. 2d 65, 67 (10 Cir. 1956). As held by this Court in *Blitz* v. *United States*, 153 U.S. 308, 315 (1894):

> ". . . The general rule that an indictment for an offence purely statutory is sufficient if it pursues substantially the words of the statute, is subject to the qualification, fundamental in the law of criminal procedure, 'that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defence and plead the judgment as a bar to any subsequent prosecution for the same offence.' *United States* v. *Simmons*, 96 U.S. 360, 362; *United States* v. *Hess*, 124 U.S. 483, 488. As said in *United States v. Carll*, 105 U.S. 611, 612, it is not sufficient to set forth the offence in the words of the statute, 'unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.' "

Section 145(b) of the Internal Revenue Code of 1939 and Section 7201 of the Internal Revenue Code of 1954 do not expressly set forth all essential elements of the offense of attempting to evade or defeat a tax. The specific elements lacking are:

1. Existence of a tax deficiency; and
2. Knowledge by the accused of such deficiency.

(a) The substantive counts fail to charge that there was a tax deficiency.

It is well settled that existence of a tax deficiency, *i.e.*, underpayment of the tax, is an essential element of the offense of attempted tax evasion. It was so held in *Small* v. *United States*, 255 F. 2d 604, 606 (1 Cir. 1958): "[O]ne of

the basic elements of the offense is an understatement of tax. . . ." The principle was recognized by this court in *Lawn* v. *United States*, 355 U.S. 339, 361 (1958), wherein it was stated: "While, of course, a conviction upon a charge of attempting to evade assessment of income taxes by the filing of a fraudulent return cannot stand in the absence of proof of a deficiency. . . ." Many other cases support the proposition that existence of a tax deficiency is an essential element of the offense.[14] All these decisions concern the necessity that the evidence prove the element of a tax deficiency in order for a conviction to stand, but they are equally applicable to the requisites of an indictment. Existence of a tax deficiency is the very *corpus delicti*. Unless there is a tax due and owing there can be no attempted evasion, and it necessarily follows that existence of such tax deficiency must be charged in the indictment.

Therefore, unless the indictment here in question (R. 1-10) can be construed to *directly and expressly* charge that there was a deficiency in the income taxes of the corporation, without any uncertainty or ambiguity, it is fatally defective. Manifestly, counts 1 through 4 do not so charge, either directly or by necessary implication. The only part of the indictment[15] which could conceivably be deemed to refer to a tax deficiency is the portion in which the *means* of the alleged attempt to evade and defeat taxes are set out. It is

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[14] *E.g.*, Jones v. United States, 282 F. 2d 745, 747 (4 Cir. 1960); Koontz v. United States, 277 F. 2d 53 (5 Cir. 1960); Holt v. United States, 272 F. 2d 272, 279 (9 Cir. 1959); United States v. Alker, 260 F. 2d 135, 140 (3 Cir. 1958), cert. den. 359 U.S. 906; Davis v. United States, 226 F. 2d 331, 334 (6 Cir. 1955), cert. den. 350 U.S. 965; United States v. Schenck, 126 F. 2d 702, 704 (2 Cir. 1942), cert. den. 316 U.S. 705; Gleckman v. United States, 80 F. 2d 394, 399 (8 Cir. 1935), cert. den. 297 U.S. 709.

[15] In discussing the language of the first four counts of the indictment, Count 1 will be referred to. Except for dates and amounts, the counts are identical.

stated that the five persons accused did attempt to evade taxes *by*:

> ". . . preparing and causing to be prepared, and mailing and causing to be mailed at Houston, Texas, a false and fraudulent corporate income tax return on behalf of Farnsworth & Chambers Company, Inc., at Houston, Texas for the calendar year of 1951, which was filed on or about April 16, 1952 with the Collector of Internal Revenue for the First Internal Revenue District at Austin, Texas, wherein it was stated that the net income of the said corporation for the said calendar year of 1951 was the sum of $399,135.98, and that the total amount of tax due thereon was the sum of $194,482.66, whereas, as they then and there well knew the net income of the corporation for the said calendar year of 1951 was the sum of $763,599.62 upon which said net income the corporation owed to the United States of America a total tax of $482,278.96. . . ." (R. 2).

There is absolutely no charge that the corporation owed more taxes than it paid for the year. Nowhere is it stated how much tax the corporation *paid* for or during the year. It is stated that the accused persons (all five of them) did prepare and mail *a* return, but there is no charge that it was the only return and there is no charge that the corporation paid only the amount shown on the return. At best, the above language is a mere recital. Most certainly it does not constitute the *direct, express and unambiguous* charge of the essential element of a tax deficiency that is necessary. As held by this Court in *United States* v. *Hess*, 124 U.S. 483, 486 (1888):

> ". . . No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment, or implication, and the charge must be made directly, and not inferentially, or by way of recital."

Accord, *Harris* v. *United States*, 104 F. 2d 41, 45 (8 Cir. 1939); *Asgill* v. *United States*, 60 F. 2d 780, 784 (4 Cir. 1932).

The indictment in question may be read and read again, but no charge of a tax deficiency will be found therein. Indeed, for the reasons discussed above, such charge is not made in the indictment even by way of inference or recital.

(b) The substantive counts fail to charge that the accused had knowledge of a tax deficiency.

Not only does the indictment fail to charge existence of a tax deficiency, but, by the same token, it also fails to charge that the accused *knew* there was a tax deficiency. This is a fatal defect. *Ingram* v. *United States*, 360 U.S. 672 (1959); cf. *Pettibone* v. *United States*, 148 U.S. 197 (1893); *United States* v. *Carll*, 105 U.S. 611 (1882). In *Ingram* this Court reversed the convictions of two defendants charged with conspiracy to violate Section 7201, Int. Rev. Code of 1954, by attempting to evade taxes of another. The reversal was upon the ground that knowledge of the tax liability, and that it had not been paid, was an essential element of the substantive offense, and that such knowledge was not established by the evidence.

The indictment alleges that the accused "mailed" a return showing a stated amount of tax,

> ". . . whereas, as they then and there well knew the net income of the corporation for the said calendar year of 1951 was the sum of $763,599.62 upon which said net income the corporation owed to the United States of America a total tax of $482,278.96. . . ." (R. 2).

However, it is not stated that the accused *knew* that the recited tax had not been paid. It is certainly not stated that they knew the correct tax would not be paid when due, so

as to create a tax deficiency. The lack of such a charge represents omission of an essential element and renders the indictment insufficient to charge an offense.

Closely related to the absence of a charge of knowledge of a tax deficiency is the generality of the accusation of criminal intent. The indictment merely follows the terms of the statute, alleging that the accused "wilfully" attempted to evade and defeat part of the corporate taxes (R. 2). As used in Section 145(b), Int. Rev. Code of 1939, and Section 7201, Int. Rev. Code of 1954, "willfully" means a specific intent involving evil motive, bad purpose or corrupt design; a specific intent to defraud the United States. *Abdul* v. *United States*, 254 F. 2d 292, 293 (9 Cir. 1958); *Wilson* v. *United States*, 250 F. 2d 312, 319 (9 Cir. 1957); *Wardlaw* v. *United States*, 203 F. 2d 884, 887 (5 Cir. 1953). However, the term "willful" in itself has no fixed meaning — it is a term of many meanings. *Spies* v. *United States*, 317 U.S. 492, 497 (1943).

Therefore, we submit that by merely following the terms of the statute and alleging that the accused acted "wilfully," without further charging the requisite intent, the indictment fails to sufficiently charge an essential element of the offense and is invalid. Cf. *Batchelor* v. *United States*, 156 U.S. 426, 429 (1895); *United States* v. *Britton*, 107 U.S. 655, 669 (1883); *Johnson* v. *United States*, 95 F. 2d 813, 816 (4 Cir. 1938).[16]

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[16] In Elwert v. United States, 231 F. 2d 928, 931-932 (9 Cir. 1956), it was stated that a similar contention "may have merit," but the contention was rejected upon the ground that the defendant failed to show that his defense had been prejudiced. We submit that the defect is fundamental, and renders the indictment void — whether or not actual prejudice is shown.

(c) The conspiracy count fails to charge the basic elements of the substantive offense.

We recognize that, in an indictment for conspiring to commit an offense, it is not necessary to allege with "technical precision" each element of the crime which is the object of the conspiracy, or to state such object with the detail which is required in an indictment for committing the substantive offense. *Wong Tai* v. *United States*, 273 U.S. 77, 81 (1927). However, it seems well settled that an indictment for conspiracy must, at least briefly, charge every essential element of the substantive crime in order to state an offense. *Wishart* v. *United States*, 29 F. 2d 103, 106-107 (8 Cir. 1928); *Middlebrooks* v. *United States*, 23 F. 2d 244 (5 Cir. 1928); *Brown* v. *United States*, 21 F. 2d 827 (5 Cir. 1927); *U. S.* v. *Carthon*, 125 F. Supp. 419, 423 (M.D.Ga. 1954); accord, *Robinson* v. *United States*, 263 F. 2d 911 (10 Cir. 1959); *United States* v. *Calhoun*, 257 F. 2d 673, 680 (7 Cir. 1958). Unless a conspiracy indictment sets out the elements of the substantive offense, it fails to show that the object of the conspiracy is an offense against the United States and is fatally defective. See *Pettibone* v. *United States*, 148 U.S. 197 (1893).

The conspiracy count of the instant indictment (R. 6) utterly fails to charge two essential elements of the offense of attempted tax evasion. It fails to charge (1) existence of a tax deficiency, and (2) knowledge of existence of a tax deficiency on the part of the accused. These essential elements of the offense could not possibly be said to be charged by Count 5 — not even by implication. The count fails to contain the slightest reference to a tax deficiency, or knowledge thereof by the accused.

In effect, Count 5 alleges only that the accused did "conspire to commit offenses against the United States." By

wholly omitting basic elements of the offenses alleged to be the object of the conspiracy, the conspiracy count fails to state an offense. See *United States* v. *Deutsch*, 243 F. 2d 435, 436 (3 Cir. 1957); *Hamner* v. *United States*, 134 F. 2d 592, 594-595 (5 Cir. 1943).

2. The indictment wholly fails to apprise the accused employees of the "nature and cause of the accusation" of attempted evasion of corporate income taxes within the meaning of the Sixth Amendment.

The short-form indictment (R. 1-10) before this Court is woefully lacking in facts. In substance it merely follows the statutory definition of the offense, and it contains only generalities and conclusions. We submit that the indictment does not comply with the mandate of the Sixth Amendment to the Constitution of the United States. It does not meet the tests laid down by this Court in many cases, such as *United States* v. *Cruikshank*, 92 U.S. 542, 557-558 (1876):

> "In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI . . . It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species, —it must descend to particulars.' 1 Arch. Cr. Pr. and Pl., 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this,

facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances."

Accord, *Keck* v. *United States*, 172 U.S. 434, 437 (1899), and cases therein cited.

(a) The indictment does not set out the particulars of the alleged "attempt to evade and defeat" corporate taxes.

While perhaps an indictment in the general words of the statute might suffice when an individual is charged with attempting to evade his own personal income taxes, different considerations are clearly applicable to a charge of attempted evasion of *corporate* taxes. In a case of personal tax evasion it could be argued with force that the indictment need not descend to particulars, since each taxpayer knows what his own income is and has the duty to assess his own income taxes. However, such reasoning cannot be applied to a case of attempted evasion of taxes imposed upon a corporation. No corporate officer or employee is necessarily in a position to know what the income of the corporation is, and the statute does not charge any *particular* officer or employee with the duty of filing a return on behalf of the corporation. Int. Rev. Code of 1954, §6012.

Petitioners were accused of attempting to evade taxes imposed upon a rather large corporation of which they were officer-employees. This corporation handled tens of millions of dollars in business each year, necessitating thousands of transactions, and it had hundreds of employees (see R.B. 115). Under these circumstances, the vague and general allegations of the indictment are wholly insufficient. As a practical matter, the indictment simply

does not inform the accused persons of the charge against them, so that they might prepare to defend themselves. This seems especially true in light of the principle that the accused employees were presumed innocent of any offense. The indictment is clearly insufficient to comply with the Fifth and Sixth Amendments. Cf. *United States* v. *Hess* 124 U.S. 483 (1888); *Lowenburg* v. *United States*, 156 F. 2d 22 (10 Cir. 1946); *Skelley* v. *United States*, 37 F. 2d 503 (10 Cir. 1930); *Jarl* v. *United States*, 19 F. 2d 891 (8 Cir. 1927); *Boykin* v. *United States*, 11 F. 2d 484 (5 Cir. 1926); *Etheredge* v. *United States*, 186 Fed. 434 (5 Cir. 1911).

The allegation that the accused "did wilfully and knowingly attempt to evade and defeat taxes" is grossly inadequate. To be valid the indictment would have to charge the basic particulars of the attempted evasion alleged; it would have to charge *how* the attempt was made in reasonable detail. In point are the cases holding that, in an indictment for misapplying the funds of a national bank, it is not sufficient to allege that the defendant "willfully misapplied" the funds, but that facts must be alleged showing *how* the misapplication was made, and that it was an unlawful one. *Batchelor* v. *United States*, 156 U.S. 426 (1895); *United States* v. *Britton*, 107 U.S. 655 (1883); *Johnson* v. *United States*, 95 F. 2d 813 (4 Cir. 1938); *United States* v. *Cawthon*, 125 F. Supp. 419 (M.D.Ga. 1954).

The statements in the substantive counts (R. 1-6) that the accused attempted to evade taxes by "falsifying and altering" invoices and other records, "concealing" assets, "diverting" income, etc., are manifestly insufficient to salvage the indictment. Those allegations mean nothing, as it is not shown how such actions did, or could, result in an underpayment of tax by the corporation. The same is true with respect to the allegations in parts A-D of Count 5 that "it was a part of said conspiracy" to do various things (R. 7).

How could "falsifying invoices" result in a tax deficiency? By showing an expenditure to be for one thing when it was in fact for something else, perhaps? That could contribute to a tax deficiency only if one type of expediture were tax-deductible whereas the other type was not — but no such charge appears in the indictment. It cannot be imagined how "concealing assets" could result in a tax deficiency. Diversion of income from the corporation could not cause a tax deficiency on its part unless the diversion constituted a dividend — but it is not charged what the diversions constituted. If such diverted income represented additional compensation paid to the recipients, or other expense, or if it were an unauthorized theft, the corporation would be entitled to a tax deduction for the amounts diverted, with the result that such diversions would not cause the corporation to owe any more tax. Any connection between the acts alleged and an understatement of taxable income can be based only upon pure conjecture — it does not appear in the indictment.

(b) The indictment does not set out the particulars of the alleged falsity of the tax returns.

The allegation that one of the means of the attempted evasion was by "preparing and causing to be prepared, and mailing and causing to be mailed" a "false and fraudulent corporate income tax return," is not sufficient to inform the accused of the nature and cause of the accusation. It is a mere conclusion. Note that the accused are not charged with *filing* the return, and it is not even stated *to whom* it was "mailed." The further allegation that the net income of the corporation was so much, upon which income it owed a tax of so much, is also nothing but a conclusion of the pleader. Conclusions will not suffice; they add nothing to the indictment. *Clay* v. *United States*, 218 F. 2d 483, 486 (5 Cir. 1955).

It is required that *facts* be set out which, if proven, would show the falsity of the return. Cf. *Babb* v. *United States*, 218 F. 2d 538, 541 (5 Cir. 1955). At a minimum, we submit that the indictment would have to state which entries on the return are alleged to be false. In *United States* v. *Demos*, 291 Fed. 104 (S.D. Fla. 1923), which apparently was the first case to consider a tax evasion indictment, the indictment was held to be insufficient by reason of the very defects of which we complain.[17]

(c) The indictment does not charge what part the accused individually had in the alleged "attempt to evade and defeat" taxes.

Want of particularity such as is found in this indictment would be fatal if it purported to charge *only one* defendant. But here the violation of constitutional safeguards is flagrant. The indictment attempts to charge *five different individuals*, and it in no way distinguishes the accusations against any one individual from the accusations against the others. As a consequence, each of the accused is left with no clue as to the charges against which *he* must be prepared to defend. The blanket, "shotgun" approach of the pleading renders it preposterous on its face. For example, is it possible that *all five* of the persons "mailed" *a* return, as alleged?

We submit that, in order to afford any real protection, the Sixth Amendment must be construed to entitle *each* person charged in an indictment to a statement of the accusations against him *individually*.

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[17] The only tax case found which cited Demos is Janko v. United States, 281 F. 2d 156, 161 (8 Cir. 1960), which distinguished it.

III.

Contrary to the Sixth Amendment Petitioners were tried in absentia. By basing the convictions and sentences upon evidence adduced at the Farnsworth trial, the District Court rejected the pleas of nolo contendere and lost jurisdiction to convict and sentence Petitioners upon such pleas.

Contrary to the Sixth Amendment Petitioners in practical effect were tried *in absentia*. They were neither present nor represented at the Farnsworth trial, were not parties to it and were not confronted with the witnesses against them. Evidence against them was received without benefit of cross-examination or rebuttal evidence on their behalf. Petitioners believe that the record leaves the inescapable inference that they were convicted and sentenced upon the basis of evidence adduced at the Farnsworth trial — rather than upon their *nolo contendere* pleas. This action constituted a rejection of Petitioners' pleas of *nolo contendere* as a matter of law; accordingly, the trial court lost jurisdiction to convict and sentence upon such pleas.

The testimony adduced in the ten week long Farnsworth trial was not restricted to the two Farnsworths being tried. The Government was permitted, because of the blanket charges of conspiracy, to introduce a large quantity of evidence relating to Petitioners. It was heard by the District Court without benefit of the traditional safeguards of cross-examination or rebuttal testimony on Petitioners' behalf.

Following rearraignment on March 17 and 20, 1959 (R. 29, 41), Petitioners were not called for sentencing until June 19, 1959 (after the lengthy Farnsworth trial had ended in failure and frustration for the Government). This was contrary to the command of Rule 32(a) that "Sentence shall be imposed without unreasonable delay." Under the circumstances this delay was "purposeful [and] oppressive". Cf. *Pollard* v. *United States*, 352 U.S. 354,

361 (1957). On the day of sentencing, the proceedings were confined to the statements of counsel and certain character witnesses, and statements by Petitioners Blocker and Lott (R. 41-61). The pertinent dialogue is set forth below.

> (The Court): "Does the Government have anything to say to the Court at this time before I call on the defendants to tell me whatever they want to say or their lawyers or friends want to tell me in their behalf?
>
> (Mr. Schwartz): Your Honor, I believe the Court has heard the facts tried following these gentlemen's pleas" (R. 42).

Counsel for Blocker referred to evidence which had been adduced at the trial of the Farnsworths. The court clearly demonstrated its complete familiarity with the facts adduced at that trial (R. 46-47):

> (Counsel): "I know what exactly was testified, in substance . . . that was their business, they were representing their respective clients, but one seemed to me to be emphasizing a good deal about one of my clients, and that other —
>
> (The Court): That would be Mr. Blocker?
>
> (Counsel): Yes, it would. . . ."

Again (R. 51):

> (Mr. Lott): "Judge, I realize that I have made a great mistake and that I should have had the courage to have gotten out in 1953 when some of the younger fellows did.
>
> (The Court): That could be the first statement of remorse or repentence that I have heard during these last eleven weeks."

Finally, it appears that the court again made reference to the testimony adduced at the trial of the Farnsworths

following the testimony of the last character witness for Lott (R. 59):

> Q. "Will you tell Judge Hannay what your estimate of Mr. Lott is with respect to honesty, fairness and being a law-abiding citizen?
>
> A. Your Honor, I consider him one of the finest men I have ever known.
>
> • • •
>
> (The Witness): I would like to say that every member of our congregation would come here as a witness in his behalf, and they would say he is one of the cleanest Christian men we have ever known.
>
> (The Court): But none of them were present during the ten weeks of testimony, were they?
>
> (The Witness): Not that I know of, sir."

At the conclusion of these proceedings, and after the noon recess, Petitioners were sentenced orally by the court, commencing as follows (R. 60):

> "I have found each [defendant] guilty of the felonies as contained in the Grand Jury indictment."

Petitioners believe that, when the above statements of the District Court are considered in connection with the results of the Farnsworth trial, the record leaves the inescapable inference that the court did in fact consider the guilt or innocence of Petitioners and that Petitioners were convicted and sentenced upon the basis of evidence adduced at the Farnsworth trial — rather than upon their *nolo contendere* pleas. It would have been impossible for the court to have excluded from its mind the testimony relating to Petitioners which was adduced in the Farnsworth trial.

The error committed is clear: in practical effect, Petitioners were tried *in absentia*. The District Court made its

independent judgment of conviction that Petitioners were guilty as charged and imposed its sentence upon them, not upon the basis of their pleas of *nolo contendere*, but upon the evidence heard in the Farnsworth trial. Under these facts the judgment and sentence of the court cannot stand.

Of course, the District Court did not state for the record that its judgment and sentence were based solely upon the evidence heard and considered during the Farnsworth trial. But neither, on the other hand, did it state for the record that the Farnsworth evidence had been heard "for the limited purpose" of determining what sentence, if any, ought to be imposed upon Petitioners. We are confronted with the record unavoidably inadequate. The evidence heard by the court during the Farnsworth trial is not in the record. But, in view of the recited "finding of guilty" by the court (R. 60) and the fact that the court deferred sentencing and heard the Farnsworth evidence without indicating that it was to be considered solely for the information of the court in passing sentence upon Petitioners, "no presumption can be indulged, in the light of the various recitals . . . that the evidence was received otherwise than for the purpose of the finding, upon which the judgment appears to be pronounced. . . . The record, therefore, furnishes no ground to support the judgment as resting on acceptance of the plea [*nolo contendere*] . . . thus leaving it unsupported for want of either of the authorized pleas to the indictment." *Tucker* v. *United States*, 196 Fed. 260, 268 (7 Cir. 1912).

Origin and Meaning of Plea of Nolo Contendere

The plea of *nolo contendere* exists because it is useful in the administration of criminal justice. It is a highly technical plea. Since its meaning and consequences are not free from doubt, a review of its origin and historical develop-

ment seems appropriate. It has been referred to variously as being "a confession", "an implied confession", "a quasi confession of guilt", "a plea of guilty", "substantially, though not technically, a plea of guilty", "a conditional plea of guilty", "a substitute for a plea of guilty", "a gentleman's plea of guilty"; "a mild form of a plea of guilty", "a compromise between the government and the defendant", "an agreement on the part of the defendant that the facts charged may be considered as true for the purposes of the case", *ad infinitum*. *Annot.*, 152 A.L.R. 253, 256-258 (1944).

Nolo contendere appeared as early as the reign of Henry IV (1399-1413). 2 Hawkins, *Pleas of the Crown* 466 (8th ed. 1824). Chitty's definition and explanation of *nolo contendere* is as follows:

> "An implied confession is where, in a case not capital, a defendant does not directly own himself to be guilty, but tacitly admits it by throwing himself on the king's mercy, and desiring to submit to a small fine, which the court may either accept or decline, as they think proper. If they grant the request, an entry is made to this effect, that the defendant 'non vult contendere cum domina regina et posuit se in gratiam curiae,' without compelling him to a more direct confession. The difference in effect between an implied and an express confession is that, after the latter, not guilty cannot be pleaded to an action of trespass for the same injury; whereas it may at any time be done after the former. But no confession, however large and explicit, will prevent the defendant from taking exceptions in arrest of judgment to faults apparent in the record; for the judges must ex officio take notice of them, and anyone, as amicus curiae, may point out the exceptions." 1 Chitty, *Criminal Law* 430 (1819 ed.).[18]

Bishop, an American authority, makes the additional comment that "It [*nolo contendere*] simply justifies the court

[18] As quoted in Tucker v. United States, 196 Fed. 260, 263 (7 Cir. 1912).

in imposing sentence". 2 Bishop, *New Criminal Procedure*, §25 (2d ed. 1913).

In the United States an almost hopeless conflict of judicial authority has developed as to whether *nolo contendere* has application in felony cases; whether imprisonment can be imposed after it has been accepted; or whether maximum penalties can be so imposed. See Lenvin and Meyers, *Nolo Contendere: Its Nature and Implications*, 51 Yale L. J. 1255 (1942); *Annot.*, 152 A.L.R. 253 (1944). There are some principles, however, upon which our courts have ruled in virtual unanimity: (1) state and federal decisions are in agreement that *nolo contendere* cannot be entered by the defendant as a matter of right, and that its acceptance by the court is entirely a matter of grace, or discretion;[19] (2) once *nolo contendere* has been accepted, it is discretionary with the court whether it may be withdrawn and replaced by a plea of guilty or not guilty.[20] The unique utility of *nolo contendere* is that it fits a situation in which the demands of public policy and the requirements of justice can be satisfied by disposition of the case without contest or adjudication of the issues arising under the indictment.

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[19] Hudson v. United States, 272 U.S. 451 (1926); Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366 (D.C. Minn. 1939); United States v. Socony-Vacuum Oil Co., 23 F. Supp. 531 (W.D. Wis. 1938); Commonwealth v. Ingersoll, 145 Mass. 381, 14 N.E. 449 (1888); Commonwealth v. Horton, 26 Mass. 206 (1829); Williams v. State, 130 Miss. 827, 94 So. 882 (1923); State v. Martin, 92 N.J.L. 436, 106 Atl. 385 (Ct. Errors and App. 1919); McNab v. State, 42 Wyo. 396, 295 Pac. 278 (1931).

[20] United States v. Norris, 281 U.S. 619 (1930); Farnsworth v. Zerbst, 97 F. 2d 255 (5 Cir. 1938); United States v. Anthracite Brewing Co., 11 F. Supp. 1018 (M.D. Pa. 1934); Commonwealth v. Marino, 254 Mass. 533, 150 N.E. 841 (1926); State v. Siddall, 103 Me. 144, 68 Atl. 634 (1907); *In re* Lanni, 47 R.I. 158, 131 Atl. 52 (1925).

Nolo contendere is not a plea of guilty in the case. Rule 11 plainly gives the defendant the choice of three pleas: (1) not guilty (2) guilty or (3), with the consent of the court, *nolo contendere*.

The distinction between the pleas of guilty and *nolo contendere* is stated by the California District Court of Appeals in *Caminetti* v. *Imperial Mut. Life Ins. Co.*, 139 P. 2d 681, 689 (1943), as follows:

> ". . . The existence in the law of the two pleas, i.e., guilty and nolo contendere, is indicative of the fact that there is some distinction or difference between them. Undoubtedly the plea of nolo contendere is often used as a substitute for a plea of guilty but it amounts only to a declaration by the defendant that he will not contend. It has been held not to be a confession of guilt. Barker v. Almy, 20 R.I. 367, 39 A. 185. It is uniformly held that such a plea cannot be used against the defendant as an admission in any civil suit for the same act. Manifestly, if a plea of nolo contendere has the same effect as a plea of guilty, viz., admitting the charge, then it differs in no respect from a plea of guilty. Buck v. Commonwealth, 107 Pa. 486, 489. Tucker v. United States, 7 Cir., 196 F. 260, 41 L.R.A., N.S., 70, is authority for the statement that the plea of nolo contendere is in fact a confession on which a defendant may be sentenced in a particular prosecution, and as the plea is limited to that particular case, such conviction cannot be used in another proceeding to discredit the witness; then in State v. Suick, 195 Wis. 175, 217 N.W. 743, 744, we find the following: 'The plea of nolo contendere is an implied confession. Judgment of conviction follows such a plea as a matter of course, yet the plea itself contains no admissions which can be used against the defendant in another action.' *Strictly speaking, therefore, the plea of nolo contendere amounts only to an agreement on the part of the defendant that the fact charged may be considered as true for the purposes of*

the particular case wherein it is entered. 31 A.L.R. 278. A plea of nolo contendere, while an implied, is not a conclusive confession of guilt. By entering the plea the defendant does not confess or acknowledge the charge against him, as upon a plea of guilty. Doughty v. De Amoreel, 22 R.I. 158, 46 A. 838; State v. LaRose, 71 N.H. 435, 52 A. 943; White v. Creamer, 175 Mass. 567, 56 N.E. 832." (Emphasis supplied.)

In addition, recent federal decisions establish that, unlike the pleas of guilty or not guilty, *nolo contendere* is not a plea to the indictment at all; it is "but a statement that the defendant will not contend against the charge made by the Government . . . ." *United States* v. *Jones*, 119 F. Supp. 288, 290 (S.D. Cal. 1954). As the Court of Appeals for the Fifth Circuit has repeatedly and correctly stated, "nolo contendere is a mere statement of unwillingness to contest and no more." *Mickler* v. *Fahs*, 243 F. 2d 515, 517 (5 Cir. 1957); accord, *Piassick* v. *United States*, 253 F. 2d 658, 661 (5 Cir. 1958).

The distinction between the pleas of guilty and *nolo contendere* is sound. When the accused's *nolo contendere* is accepted by the court, there comes into existence a mutual agreement not to adjudicate the issues as to the accused's guilt or innocence. The conviction obtains by agreement, based upon public policy, rather than upon a judicial determination of guilt, and the court consequently acquires jurisdictional power to enter judgment and sentence. *United States* v. *Gallagher*, 94 F. Supp. 640 (W.D. Pa. 1950). Adjudication of the issue of guilt is not authorized because the agreement not to contest does not establish the matter of guilt at all, except by inference which may or may not be correct. In fact, the courts have noted a number of reasons having no bearing upon the merits which might prompt the accused to tender a plea of *nolo contendere*: (1) to save

expenses of trial and avoid notoriety,[21] (2) to avoid unpleasant publicity,[22] (3) to avoid a hostile jury,[23] or (4) to avoid a contest obviously hopeless because of lack of witnesses.[24]

Nolo contendere, an agreement not to contest, is not a "plea in the strict sense" at all, *Fidelity-Phenix Fire Ins. Co.* v. *Murphy*, 235 Ala. 680, 166 So. 604, 609 (1936); rather it is a plea to the court, an offer to submit to judgment and sentence which may be accepted or refused. "The motion [*nolo contendere*] is decided on public policy considerations." *United States* v. *Standard Ultramarine & Color Co.*, 137 F. Supp. 167, 174 (S.D. N.Y. 1955). *Ultramarine* was an anti-trust suit; the enumerated grounds upon which the plea of *nolo contendere* was rejected were as follows: "The nature of the claimed violations; how long persisted in; the size and power of the defendants in the particular industry; the impact of the condemned conduct upon the economy; whether a greater deterrent effect will result from conviction rather than from acceptance of the plea," and the views of the Attorney General, as chief enforcement officer of the anti-trust laws. 137 F. Supp. at 172.

Conclusion of Argument Under Point

The above historical development and analysis of the plea of *nolo contendere* is consistent with this Court's holding in *United States* v. *Norris*, 281 U.S. 619 (1930), wherein it was squarely held that after the plea of *nolo contendere* has been received, nothing remains for the court to do but to render judgment and sentence, as no issue of fact exists and

[21] Lafferty v. Houlihan, 81 N.H. 67, 121 Atl. 92 (1923).

[22] *In re* Smith, 365 Ill. 11, 5 N.E. 2d 227 (1936).

[23] People *ex rel.* Atty. Gen. v. Edison, 100 Colo. 574, 69 P. 2d 246 (1937).

[24] Doughty v. De Amoreel, 22 R.I. 158, 46 Atl. 838 (1900).

none can be made while the plea remains of record. In *Norris*, a judgment of conviction and sentence entered pursuant to the defendant's plea of *nolo contendere* was affirmed. The District Court, having received the defendant's plea, thereafter received evidence in the form of a stipulation of facts, which, if considered, would have established as a matter of law that the defendant was innocent of the conspiracy charged in the indictment. The stipulation was received with the express limitation that it was to be treated as "evidence . . . for the information of the Court in determining what sentence, if any, ought to be imposed on the defendant Norris." The stipulation was made a part of the record "for the limited purposes above stated." The District Court declined to consider the effect of the stipulation upon the merits, entered its judgment of conviction and imposed its sentence upon the defendant. The Court of Appeals reversed the conviction, but this Court set that decision aside and affirmed the judgment and sentence of the District Court on these grounds:

> ". . . After the plea [*nolo contendere*], nothing is left but to render judgment, for the obvious reason that in the face of the plea no issue of fact exists, and none can be made while the plea remains of record." 281 U.S. at 623.

Norris clearly establishes the law to be that the plea of *nolo contendere*, although a proper basis for entry of judgment of conviction and imposition of sentence, is not a proper basis upon which to make an adjudication of any fact issue as to the defendant's guilt or innocence. The plain effect of this decision is that after *nolo contendere* is received, the question of guilt is no longer an appropriate subject matter for judicial determination. By the same token, if the court does receive evidence upon the issues of guilt after having accepted the *nolo* plea, the "agreement not to contest" is breached; *by implication the court rejects the plea it previously received.*

The Superior Court of Pennsylvania in *Commonwealth* v. *Rousch*, 172 Atl. 484 (1934), reversed and remanded a judgment of conviction and sentence upon the ground that the trial court, after expressly receiving the defendant's plea of *nolo contendere*, then proceeded to determine the issues as to his guilt upon the basis of evidence presented in the course of a "trial". In receiving the defendant's plea, the trial court had expressly stated that he would "sit as a jury and . . . hear both sides." In reversing the case, the Superior Court ruled as follows:

> "When a plea of nolo contendere is entered and accepted, it is not the province of the judge to adjudge the defendant guilty or not guilty. Evidence is heard only to aid the judge in fixing the sentence. . . .
>
> "• • •
>
> "The trial judge could not assume or accept the authority attempted to be given him to 'sit as a jury and hear both sides,' to find the defendant guilty on the law and the facts, and impose sentence, not on the plea, but on his findings. As there seems to have been a mutual misunderstanding between counsel and the trial judge as to his jurisdiction, and as the plea of nolo contendere was not accepted without qualification, this case must be returned for a trial in accordance with law, viz. trial by a jury unless a plea is entered and accepted. The defendant will, of course, not be prejudiced by the unaccepted plea." 172 Atl. at 485.

Under similar facts, the federal courts have reached the same conclusion. Thus, in the important case of *Tucker* v. *United States*, 196 Fed. 260, 268 (7 Cir. 1912), the Court of Appeals concluded as follows:[25]

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[25] The holding of the Tucker case that sentence of imprisonment cannot be had under *nolo contendere* was expressly overruled in Hudson v. U.S., 272 U.S. 451 (1926); but its holding that rejection of the plea may be inferred from the fact that evidence was received by the trial court remains intact.

"That these proceedings and recitals leading up to the judgment are inconsistent with acceptance of the nolo contendere plea as tendered must be presumed, as we believe, under either of the contentions for interpretation of the rule. It may be that evidence may be heard under such plea for the purpose of determining the amount of fine to be imposed, but no issue is presented for trial under the indictment, and no adjudication of guilt is authorized. [Citations omitted.] The evidence referred to in the record is not preserved, but no presumption can be indulged, in the light of the various recitals, with no acceptance of the plea mentioned, that the evidence was received otherwise than for the purpose of the finding, upon which the judgment appears to be pronounced. Moreover, the judgment is alike inconsistent with acceptance of the plea, as above defined, in pronouncing imprisonment in the penitentiary for 18 months. The record, therefore, furnishes no ground to support the judgment as resting on acceptance of the plea [citation omitted], thus leaving it unsupported for want of either of the authorized pleas to the indictment.

"The judgment of the district court is reversed, accordingly, and the cause is remanded, with direction either to accept or refuse acceptance of such plea as tendered, and proceed thereupon in conformity with law."

In this case the District Court, by hearing evidence in the Farnsworth trial and relating that evidence to Petitioners, as it obviously did during the sentencing proceedings, engaged in precisely that sort of conduct which amounts in law to a rejection of the pleas of *nolo contendere*. In so doing, the court lost jurisdiction to enter judgment and sentence upon the pleas.

It is no answer to say that the District Court committed harmless error if it did in fact "try" or reach an independent adjudication or decision as to Petitioners' guilt.

It is fundamental that, in the absence of a valid consent, a federal court cannot proceed with the trial of an accused without a jury; not because a jury is necessary to its jurisdiction, but because the accused is entitled by the terms of the Constitution to that mode of trial. *Patton v. United States*, 281 U.S. 276, 299 (1930). *Nolo contendere* is not a waiver or consent to be tried by the court.

If our position is correct, how then is the trial court to proceed in determining the appropriate sentence? The answer to this question is not difficult. By entering pleas of *nolo contendere*, the defendants for purposes of sentencing indirectly admit the truth of all matters contained in the indictment. In addition to the indictment, the District Court in this case had at its disposal certain presentence investigation reports, reference to which is authorized by the Federal Rules of Criminal Procedure (R. 29, 41). Fed. R. Crim. P. 32(c). In the exercise of its broad discretion, the District Court should have had no difficulty in determining the appropriate sentences, upon the basis of the type of offense named in the indictment and the presentence reports. If the case were one in which the court felt that the short-form indictment was so insufficient in its particulars as to leave the court in doubt as to the extent of the defendants' participation, it could have declined to accept Petitioners' pleas of *nolo contendere*.

The denial of Petitioners' motions for a bill of particulars (R. 15) clearly indicates that the District Court was of the opinion that the indictment in this case was sufficient in its particulars. Therefore, we are left to speculate as to why the court was unable to enter judgment of conviction and impose sentence upon Petitioners until such time as it had heard and considered the evidence adduced at the Farnsworth trial. The reasons for this delay are not revealed by the record. Certainly, reasonable minds may differ as to

why the District Court found such delay to be appropriate in this case. But we are concerned with a matter of criminal pleading and practice, an area of the law which has been characterized as demanding the "utmost circumspection" in courts charged with the administration of criminal justice. *United States* v. *Shneer*, 194 F. 2d 598, 602 (3 Cir. 1952). If the record in this case reflects any circumstances raising reasonable doubt as to whether Petitioners were prejudiced by the delay, or by the fact that the court received and considered evidence as to their guilt during the Farnsworth trial, such doubt should be resolved in favor of Petitioners. In matters of criminal pleading and procedure, where life and liberty are at stake, there is no room for speculation as to whether an accused may have been prejudiced through some departure from our carefully formulated system of substantive and procedural safeguards.

The Government contended below that even if the District Court did consider the evidence adduced in the Farnsworth trial in sentencing Petitioners, it was perfectly proper that it do so. That contention is wrong — if it were sustained, the necessary conequences would be to impart new meaning to the *nolo contendere* procedure and practice as heretofore existing in our criminal jurisprudence. Such a holding would establish a process in the criminal law whereby the courts, without receiving the accused's plea to the indictment, could proceed to try the accused or to hear evidence as to his guilt or innocence presented in the course of some other trial, without permitting the accused to cross-examine the witnesses or to produce rebuttal evidence, and without benefit of a jury could adjudicate his rights and impose punishment summarily. This Court, in the discharge of its duties and responsibilities in supervising the administration of the criminal law, should not permit such a result to obtain.

In legal effect, Petitioners' pleas of *nolo contendere* were rejected by the trial court; accordingly, there are no pleas presently outstanding. This Court should, at the very least, remand the case to the District Court with instructions that Petitioners be allowed to plead to the indictment and that proceedings thereafter be had in accordance with law.

IV.

Since the written judgments adjudged that Petitioners were convicted of misdemeanor offenses, imposition of prison sentences for felony offenses was beyond the jurisdiction of the District Court.

The indictment purports to charge Petitioners with the *felonies* of willfully attempting to evade and defeat corporate taxes, and conspiracy to do so (R. 1-10). However, the written judgments seem to adjudge them guilty of misdemeanor offenses. Although the judgments refer to the felony statutes, they expressly state that (R. 61-62, 63, 65):

> . . . "It is Adjudged that the defendant has been convicted upon his plea of nolo contendere of the offense of *filing false and fraudulent corporate income tax returns* . . . and the offense of conspiring to *file false and fraudulent corporate income tax returns* . . . ." (Emphasis supplied.)

The italicized language describes the misdemeanor offense proscribed by Sections 7203 and 7207, Int. Rev. Code of 1954, and Section 145(a), Int. Rev. Code of 1939. These misdemeanor offenses are lesser offenses included within the felony charges. Under Rule 31(c) it was within the authority of the District Court to so convict Petitioners of the lesser included offenses.

Sections 7203, 7207 and 145(a) each provides a maximum imprisonment of one year, and, under 18 U.S.C. §371, conspiracy to commit a misdemeanor subjects the offender to no more than the maximum punishment provided for the

misdemeanor. Therefore, we submit that the sentences imposed upon Petitioners (3 years on each count in the case of Blocker and 2 years each in the cases of Lott and Frazier) were excessive. The excessive portions should be remitted by this Court under Rule 35.

A very similar situation was presented in *United States* v. *McCue*, 160 F. Supp. 595 (D.C. Conn. 1958). In that case the defendant was charged with violating Section 145(b), the felony statute. He entered a plea of *nolo contendere* and was convicted by the District Court of violating Section 145(a), the misdemeanor statute, under Rule 31(c). After a searching analysis of this Court's decisions in *Spies* v. *United States*, 317 U.S. 492 (1943), *Berra* v. *United States*, 351 U.S. 131 (1956), and *Achilli* v. *United States*, 353 U.S. 373 (1957), and finding no contrary authority in the courts of appeals, the District Court concluded that the 145(a) misdemeanor is necessarily a lesser offense included within the felony charge of violating 145(b) by filing a false return. It was pointed out that commission of the felony necessarily involves a failure to supply correct information in violation of 145(a). The same reasoning is applicable to Sections 7201 and 7203, the 1954 Code counterparts of 145(b) and 145(a). That Section 7207 is also a lesser offense included within a 7201 charge seems obvious.[26]

We submit that the formal adjudications of guilt of misdemeanor offenses cannot be dismissed as "clerical mistakes" which may be corrected by the court at any time under Rule 36. These written judgments contain everything called for by Rule 32(b), which plainly contemplates a written judgment, and they are sufficient in every respect

[26] In Janko v. United States, 281 F. 2d 156 (8 Cir. 1960), the majority held that Section 7207 is not applicable to income tax offenses. We respectfully submit that the view of the dissenting judge is correct.

to constitute convictions of misdemeanor offenses. The references to Sections 145(b) and 7201 may be deemed superfluous. The only "mistakes" which appear in the judgments are the *excessive sentences*. The oral statement of the judge, that "I have found each guilty of the felonies as contained in the Grand Jury indictment" (R. 60), is not controlling. It would appear incongruous for such an oral statement in open court to be construed so as to change the *formal judgments* which were subsequently entered. Cf. *United States* v. *Hark*, 320 U.S. 531, 534-535 (1944), in which this Court held:

> " . . . Where, as here, a formal judgment is signed by the judge, this is *prima facie* the decision or judgment rather than a statement in an opinion or a docket entry . . . ."

CONCLUSION

WHEREFORE, Petitioners respectfully pray that the judgment of the Court of Appeals be reversed, and that the judgments and sentences be set aside and the indictment be dismissed; or, in the alternative, that the judgments and sentences be set aside and the cause be remanded to the District Court with instructions that Petitioners be permitted to replead to the indictment; or, in the further alternative, that this Court enter an order remitting the excessive portions of the sentences.

Respectfully submitted,

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December, 1960

APPENDIX

APPENDIX

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

CONSTITUTION OF THE UNITED STATES

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

INTERNAL REVENUE CODE OF 1939

Sec. 145. Penalties.

(a) Failure to file returns, submit information, or pay tax. Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations

made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution. (53 Stat. 62, as amended, 57 Stat. 144.)

(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution. (53 Stat. 62.)

• • •

INTERNAL REVENUE CODE OF 1954

Sec. 7201. Attempt to Evade or Defeat Tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. (68A Stat. 851.)

Sec. 7203. Willful Failure to File Return, Supply Information, or Pay Tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. (68A Stat. 851.)

Sec. 7207. Fraudulent Returns, Statements, or Other Documents.

Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both. (68A Stat. 853.)

UNITED STATES CODE

Title 18

Sec. 371. Conspiracy to Commit Offense or to Defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not

more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. (62 Stat. 701.)

Title 28

Sec. 2255. Federal Custody; Remedies on Motion Attacking Sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. (62 Stat. 967, as amended, 63 Stat. 105.)

Federal Rules of Criminal Procedure

Rule 2. Purpose and Construction.

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

Rule 7. The Indictment and the Information.

* * *

(c) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated

by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

• • •

Rule 11. Pleas.

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

Rule 12. Pleadings and Motions Before Trial; Defenses and Objections.

• • •

(b) The Motion Raising Defenses and Objections.

• • •

(2) Defenses and Objections Which Must Be Raised. Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial.

The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

* * *

Rule 31. Verdict.

* * *

(c) Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

* * *

Rule 32. Sentence and Judgment.

(a) Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

(b) Judgment. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(c) Presentence Investigation.

(1) When Made. The probation service of the court shall make a presentence investigation and report to

the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) **Report.** The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court.

(d) Withdrawal of Plea of Guilty: A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

(e) Probation. After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation as provided by law.

Rule 34. Arrest of Judgment.

The court shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the court may fix during the 5-day period.

Rule 35. Correction or Reduction of Sentence.

The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the

sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

Rule 36. Clerical Mistakes.

Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

Rule 37. Taking Appeal; and Petition for Writ of Certiorari.

(a) Taking Appeal to a Court of Appeals.

(1) Notice of Appeal. An appeal permitted by law from a district court to a court of appeals is taken by filing with the clerk of the district court a notice of appeal in duplicate. Petitions for allowance of appeal, citations and assignments of error in cases governed by these rules are abolished. The notice of appeal shall set forth the title of the case, the name and address of the appellant and of appellant's attorney, a general statement of the offense, a concise statement of the judgment or order, giving its date and any sentence imposed, the place of confinement if the defendant is in custody and a statement that the appellant appeals from the judgment or order. The notice of appeal shall be signed by the appellant or appellant's attorney, or by the clerk if the notice is prepared by the clerk as provided in paragraph (2) of this subdivision. The duplicate notice of appeal and a statement of the docket entries shall be forwarded immediately by the clerk of the district court to the clerk of the court of appeals. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof

to adverse parties, but his failure so to do does not affect the validity of the appeal.

(2) Time for Taking Appeal. An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

• • •

Rule 45. Time.

• • •

(b) Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal.

• • •

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No. 238

In the Supreme Court of the United States

OCTOBER TERM, 1960

H. A. LOTT, LEE BLOCKER AND LORN D. FRAZIER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 238

H. A. LOTT, LEE BLOCKER AND LORN D. FRAZIER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 107–116) is reported at 280 F. 2d 24.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1960 (R. 117). The petition for a writ of certiorari was filed on July 15, 1960, and granted on October 10, 1960 (364 U.S. 813; R. 119). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the time prescribed by Rule 37(a)(2) of the Federal Rules of Criminal Procedure for noting appeals in criminal cases can be enlarged by the filing of an untimely motion in arrest of judgment.

2. Whether petitioners' motions in arrest of judgment may be treated, in the circumstances of this case, as valid motions under Rule 12(b) or 28 U.S.C. 2255.

3. Whether the indictment charges petitioners with the offense of having wilfully attempted to evade the corporate tax and with conspiracy to commit the substantive offenses.

4. Whether the trial court convicted and sentenced petitioners not upon their pleas of *nolo contendere* but upon evidence adduced at the trial of their co-defendants.

5. Whether the characterization of petitioners' offenses in the formal judgments entered by the trial court, correctible, if erroneous, under Rule 36 of the Federal Rules of Criminal Procedure, transmuted the felonies charged in the indictment into misdemeanors.

STATUTES AND RULES INVOLVED

The Internal Revenue Code of 1939, Section 145(b); Internal Revenue Code of 1954, Section 7201; 18 U.S.C. 371; 28 U.S.C. 2255; Federal Rules of Criminal Procedure, Rules 12(b)(2), 32(a), 32(d), 33, 34, 36, 37(a)(2), and 45(b); Criminal Appeals Rules of 1933, Rules I, II(2), and III are set out in the Appendix, *infra*, pp. 43–50.

STATEMENT

Petitioners (together with two other individuals not involved in this proceeding) were indicted in the United States District Court for the Southern District of Texas for having wilfully attempted to evade the taxes of Farnsworth and Chambers Company, Inc., for the years 1951 through 1954 (counts one through four), and for conspiracy to commit the substantive offenses (count five) (R. 1–10). The substantive counts alleged, *inter alia,* the following amounts of reported and corrected corporate net income and tax liability (R. 1–6):

Net income

Year	Reported	Corrected	Additional
1951	$399, 135. 98	$763, 599. 62	$364, 463. 64
1952	410, 937. 87	495, 528. 77	84, 590. 90
1953	179, 628. 93	362, 929. 90	183, 300. 97
1954	282, 441. 03	406, 898. 80	124, 457. 77
	$1, 272, 143. 81	$2, 028, 957. 09	$756, 813. 28

Tax liability

Year	Reported	Corrected	Additional
1951	$194, 482. 66	$482, 278. 96	$287, 796. 30
1952	207, 135. 40	251, 122. 66	43, 987. 26
1953	87, 907. 04	183, 223. 55	95, 316. 51
1954	135, 797. 53	200, 515. 57	64, 718. 04
	$625, 322. 63	$1, 117, 140. 74	$491, 818. 11

Petitioners entered *nolo contendere* pleas on March 17 and 20, 1959. The court accepted the pleas and ordered pre-sentence investigation (R. 16–41).

Thereafter, the two remaining co-defendants were tried; one was acquitted and the jury could not agree as to the other (Pet. Br. 5). On June 19, 1959, the court heard petitioners' pleas in mitigation (R. 42–59) and imposed the following sentences: upon petitioner Blocker, concurrent three-year prison terms; upon petitioners Frazier and Lott, concurrent two-year prison terms; and upon each petitioner, fines totaling $20,000 (R. 60–61). The court filed formal written judgments on June 22, 1959 (R. 61–66). Petitioners filed motions in arrest of judgment on June 23, 1959, which were denied on July 13, 1959 (R. 66–72). Notices of appeal were filed by petitioner Lott on July 15, 1959, and by petitioners Blocker and Frazier on July 17, 1959 (R. 74, 80–82). The court of appeals (one judge dissenting, without opinion) dismissed the appeals as untimely (R. 107–116).

SUMMARY OF ARGUMENT

I

The court of appeals had no jurisdiction over this case since the appeal was not timely.

A. Concededly, petitioners did not appeal within ten days after entry of the sentence and judgment, as required by Rule 37(a)(2) of the Federal Rules of Criminal Procedure. They contend, however, that, because they filed motions in arrest of judgment, their time for taking an appeal was tolled to the end of the ten-day period following the denial of the motions, as Rule 37(a)(2) also provides. But the motions in arrest of judgment were themselves untimely since

Rule 34 provides that a motion in arrest of judgment must be made within five days after "determination of guilt." Petitioners' guilt was determined when the district court accepted petitioners' *nolo contendere* pleas (*Hudson* v. *United States*, 272 U.S. 451, 455; *United States* v. *Norris*, 281 U.S. 619, 623), some three months before the motions in arrest of judgment were filed. Since the motions in arrest were untimely, they cannot serve to toll the ten-day period after judgment for filing notices of appeal.

Petitioners contend that the appeal provisions of Rule 37(a)(2) do not require reference to the time limitations of Rule 34, and that therefore even an untimely motion in arrest of judgment tolls the ten-day period in Rule 37(a)(2). If accepted, this position would render the five-day limit of Rule 34 (as well as the five-day period "after verdict or finding of guilty" provided in Rule 33 for motions for a new trial) without any meaning. For motions in arrest of judgment would not have to be made within five days after conviction, but could be made within ten days after sentence and judgment. Thus, by petitioners' contention, the time for filing both motions in arrest of judgment and notices of appeal is enlarged, in direct contradiction of Rule 45(b) which forbids the enlargement of these periods. In contrast, the government's position gives full effect to both Rules 34 and 37(a).

B. 1. The court of appeals had no jurisdiction even if petitioners' motions in arrest of judgment are considered as motions under Rule 12(b) or 28 U.S.C. 2255. Rule 12(b) allows motions (after the pre-trial

stage of the case) attacking the jurisdiction of the court or alleging the failure of the indictment to charge an offense "during the pendency of the proceeding." The Rule was promulgated under a statute authorizing this Court to prescribe "rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty, * * * or plea of guilty." Thus, the phrase "pendency of the proceeding" can refer only to the period up to the time of verdict, and not thereafter. Here petitioners' motions were made not just after verdict, *i.e.*, when their pleas were accepted by the court, but even after sentence and judgment. Moreover, if Rule 12(b) (which has virtually the same language as Rule 34) allowed motions at any time after conviction, Rule 34—providing for motions in arrest of judgment only during the five-day period after conviction—would become almost entirely superfluous.

If petitioners' motions can be considered as valid under Rule 12(b), the only issue before the Court is petitioners' attack on the indictment. This is the only issue raised by petitioners here which comes even arguably within the scope of Rule 12(b). Rule 37 tolls the ten-day period for filing notices of appeal on the case as a whole only for valid motions under Rules 33 and 34, not for motions under Rule 12(b). As to the latter, an appeal taken within ten days of the denial of the motion would save only those issues cognizable under Rule 12(b).

2. Petitioners' motions cannot be considered as valid under 28 U.S.C. 2255. Both by the terms of the statute and by the ruling of this Court (*Heflin* v.

United States, 358 U.S. 415), 28 U.S.C. 2255 is available only for a person who is "in custody." Here, petitioners were not in custody at the time they made their motions or at any subsequent time.

II

If the court of appeals had jurisdiction, petitioners' contentions are nevertheless without substance on their merits.

A. The indictment and the bill of particulars voluntarily furnished by the government sufficiently apprised petitioners of the nature of the charges against them. The first four counts of the indictment (charging wilfully attempted evasion of corporate taxes) follow the language of the evasion statutes, which is all that is required, and also set forth, in considerable detail, the various means by which the attempted evasion was effected. The conspiracy count follows the language of 18 U.S.C. 371 and describes the acts implementing the conspiracy. In short, the indictment charged all the essential elements of the offense, leaving only specific details to be proved by evidence introduced at the trial.

B. The record clearly shows that petitioners were convicted and sentenced on their pleas of *nolo contendere*, as the judgments themselves explicitly stated, and not upon the evidence adduced at the trial of their co-defendants. The only references by the court to the latter trial were in response to statements made by petitioners' counsel during the sentencing proceeding. Moreover, petitioners made no motion to withdraw their pleas before sentence was imposed; they cannot, having relied on the advantages of *nolo*

contendere pleas, seek to withdraw them once they found that their sentences were more than they expected.

C. The written judgments describe petitioners' offenses as "filing false and fraudulent corporate income tax returns" and "conspiring to file false and fraudulent corporate income tax returns"—which are misdemeanor offenses. However, the written judgments do not directly mention misdemeanor sections of the Code but instead specifically state that petitioners violated Sections 145(b) of the 1939 Code and Section 7201 of the 1954 Code, both felony provisions. Moreover, the indictment explicitly charged felonies, petitioners pleaded *nolo contendere* to felonies, the district court orally found them guilty of felonies, and the sentences imposed were appropriate only for felonies.

In these circumstances, it is clear that petitioners were convicted and sentenced for felonies. The oral, not the written, sentence is conclusive; only if the oral sentence is ambiguous can other evidence, such as the written judgment, be used to ascertain the intent of the court. While here the oral sentences were unambiguous, even if other evidence could be relied on to ascertain the court's intent, this evidence establishes beyond doubt that petitioners were convicted and sentenced for felonies. If petitioners wish to correct what is obviously a clerical error in the written judgments, their proper remedy is a motion under Rule 36, which provides the means for correcting such errors.

ARGUMENT

I

THE COURT OF APPEALS LACKED JURISDICTION BECAUSE NO TIMELY APPEAL WAS TAKEN

A. PETITIONERS' MOTIONS IN ARREST OF JUDGMENT HAD NO TOLLING EFFECT UNDER RULE 37(a)(2) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE SINCE THEY WERE NOT FILED WITHIN FIVE DAYS AFTER DETERMINATION OF GUILT, AS REQUIRED BY RULE 34. THEREFORE, THEIR NOTICES OF APPEAL WERE UNTIMELY

Petitioners' *nolo contendere* pleas were tendered and accepted on March 17, 1959 (as to petitioners Blocker and Frazier (R. 16–29)) and on March 20, 1959 (as to petitioner Lott (R. 29–41)). The district court sentenced petitioners on June 19, 1959 (after the conclusion of the trial of two co-defendants which ended in acquittal for one and a hung jury as to the other). Formal judgments of conviction were entered against petitioners on June 22, 1959 (R. 61–66). Motions in arrest of judgment were thereafter filed on June 23, 1959 (R. 66–70) and were denied on July 13, 1959 (R. 72). Notices of appeal were filed by petitioner Lott on July 15, 1959 (R. 74–75) and by petitioners Blocker and Frazier on July 17, 1959 (R. 80–82). The question is whether these notices of appeal were timely filed. If the notices were not timely filed, then it is well settled that the court of appeals, and consequently this Court, are without power to consider the merits of petitioners' appeal. *United States* v. *Robinson*, 361 U.S. 220.

Rule 37(a)(2) [1] (Appendix, *infra*, pp. 47–48) provides, in part, that "[a]n appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from * * *." Petitioners admittedly (Pet. Br. 12) did not appeal within ten days after entry of the judgments, *i.e.*, imposition of sentence (*Berman* v. *United States*, 302 U.S. 211, 212). Rule 37(a)(2) provides additionally, however, that "if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion." Petitioners did file motions in arrest of judgment within 10 days after their sentences and formal judgments of conviction. But the tolling provision of Rule 37(a)(2) is nevertheless inapplicable because petitioners' motions were filed out of time and were themselves invalid. Accordingly, the notices of appeal had no operative effect.

1. *Petitioners' motions in arrest of judgment were untimely.*—Rule 34 (Appendix, *infra*, p. 47), providing for the arrest of judgment if an indictment "does not charge an offense or if the court was without jurisdiction of the offense charged," requires that "[t]he motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the court may fix during the 5-day period." Here, the proffer and acceptance of the *nolo contendere* pleas on March 17 and

[1] All references to Rules are to the Federal Rules of Criminal Procedure, unless otherwise stated.

March 20, 1959—some three months before the motions in arrest of judgment were filed—constituted the "determination of guilt" within the meaning of Rule 34. It is well settled that a jury verdict (*Drown* v. *United States*, 198 F. 2d 999, 1007 (C.A. 9), certiorari denied, 344 U.S. 920; *Finn* v. *United States*, 256 F. 2d 304 (C.A. 4)) or acceptance of a guilty plea (*Marteney* v. *United States*, 216 F. 2d 760, 762 (C.A. 10); *United States* v. *Bradford*, 194 F. 2d 197, 201 (C.A. 2)) is a "determination of guilt" for purposes of Rule 34. A *nolo contendere* plea is tantamount to a plea of guilty for the purposes of the particular case in which the plea is entered. *Hudson* v. *United States*, 272 U.S. 451, 455.[2] As this Court stated in *United States* v. *Norris*, 281 U.S. 619, 623:

> After the plea [of *nolo contendere*], nothing is left but to render judgment, for the obvious reason that in the face of the plea no issue of fact exists, and none can be made while the plea remains of record. * * * [T]he plea of *nolo contendere*, upon [the question of guilt or innocence] was as conclusive as a plea of guilty would have been. * * *
>
> The court [is] no longer concerned with the question of guilt, but only with the character and extent of the punishment.

---

[2] The Rules also acknowledge the similarity. Rule 32(d) (Appendix, *infra*, pp. 46–47) for example, provides: "*Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea." The plea of *nolo contendere* is thus included under the heading, "Plea of Guilty."

Thus, the trial court here, after accepting the *nolo contendere* pleas—which it noted are "equivalent to a plea of guilty" (R. 42)—was solely concerned with the pre-sentence investigation preceding entry of final judgments at the conclusion of the entire case (R. 28–29).

Petitioners' contention that "determination of guilt" for the purposes of Rule 34 occurs upon "entry of judgment" is without substance. While time for appeal in Rule 37(a)(2) is measured from "entry of the judgment," the time for filing a motion in arrest of judgment specifically runs from "determination of guilt" under Rule 34. *United States* v. *Norris, supra,* and Rule 32[3] specifically recognize that determination of guilt and entry of judgment are disparate. Petitioners, in effect, would have this Court rewrite Rule 34 to substitute "entry of judgment" for "determination of guilt" (see Pet. Br. 18–19, 20). But if the framers of the Rules had intended such a result, they would have said so. Instead, the Notes of the Advisory Committee state that Rule 34 "continues existing law except that it enlarges the time for making motions in arrest of judgment from 3 days to 5 days. See Rule II(2) of Criminal Appeals Rules of 1933, 292 U.S. 661 * * *" (see Appendix, *infra,* p. 49). It follows that "determination of guilt" in Rule 34 has the same meaning as "verdict or finding of guilt" in Rule II(2) of the Criminal Appeals Rules of 1933. See also Orfield, *Arrest of Judgment*

[3] Rule 32(b) provides: "*Judgment.* A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. * * *"

in Federal Criminal Procedure, 42 Iowa Law Review 8, 10, 24.

This Court admonished in *United States* v. *Robinson, supra*, 361 U.S. at 229, that any revision of the Rules tending to enlarge the time for taking an appeal should be effected "through the rule-making process and not by judicial decision." The Court in *Robinson* relied on Rule 45(b) (Appendix, *infra*, p. 48) which explicitly provides that a district court has no power to "enlarge the period for taking any action under Rules 33 [and] 34 * * * or the period for taking an appeal." Thus, the district court had no power to hear petitioners' untimely motions in arrest of judgment. Petitioners' proposal to regard "determination of guilt" in terms of "entry of judgment" would have the effect of enlarging both "the period for taking any action under Rule * * * 34 [and] the period for taking an appeal," in express contravention of Rule 45(b).

2. *Petitioners' untimely motions in arrest of judgment did not toll the time for taking an appeal.*— When the trial court accepted the *nolo contendere* pleas constituting the "determination of guilt" within the meaning of Rule 34, petitioners had five days within which to move in arrest of judgment. Since they failed to do so, the motions which petitioners filed three months later, after the formal judgments had been entered, were untimely and without any validity as motions "in arrest of judgment" for the tolling purposes of Rule 37(a)(2). This conclusion is in accord with the views expressed by the Courts of

Appeals for the Third, Fifth, and Ninth Circuits. *United States* v. *Bertone*, 249 F. 2d 156, 158–159 (C.A. 3); *O'Neal* v. *United States*, 264 F. 2d 809 (C.A. 5); *Marion* v. *United States*, 171 F. 2d 185 (C.A. 9), certiorari denied, 337 U.S. 944; *Pugh* v. *United States*, 197 F. 2d 509, 511 (C.A. 9). While those cases dealt with the timeliness of appeals under Rule 37(a)(2) where untimely motions for new trial had been filed under Rule 33 (Appendix, *infra*, p. 47)—except for *Marion*, which also involved a motion under Rule 34—the precedents are applicable here.[4] For Rule 33 requires that a motion for a new trial be made within five days of "verdict or finding of guilty," a phrase which has the same meaning, the Advisory Committee Notes show (see *supra*, pp. 12–13), as "determination of guilt" in Rule 34. And Rule 37(a)(2) allows appeal within ten days after entry of an order denying a motion for a new trial, just as after denial of a motion in arrest of judgment. Only the Tenth Circuit has held that the time for taking an appeal under Rule 37(a)(2) may be extended by the filing of an untimely motion for a new trial. *Lujan* v. *United States*, 204 F. 2d 171; *Smith* v. *United States*, 273 F. 2d 462. In *Smith* the court conceded that the decisions of the other courts of appeals "tend to harmonize the two rules and that *Lujan* creates an anomalous situation" which "stands alone among the

[4] The court below treated Rules 33 and 34 as identical for the purpose of determining whether untimely motions under either Rule extended the time for filing an appeal under Rule 37(a)(2). 280 F. 2d at 27.

decisions considering the question" (273 F. 2d at 465).[5]

Petitioners make Rule 37 the exclusive guide to the determination of the timeliness of the appeals. In their view, the fact that the motions in arrest were themselves invalid—because untimely filed under Rule 34—is irrelevant since they complied with the literal requirement of Rule 37(a)(2). This would mean that Rule 37 has in effect rendered the five-day limits of Rules 33 and 34 without any meaning at all. As the Ninth Circuit held in *Pugh, supra,* 197 F. 2d at 511, if petitioners' contention "were the law, in every case the 5 days for such a motion for a new trial would run from the entry of the judgment and the beginning of the running of time from the making of the finding of guilt provided in Rule 33 would be an absurd

[5] Petitioners argue (Pet. Br. 21) that both the Tenth Circuit and this Court assumed jurisdiction in *Sullivan* v. *United States*, 212 F. 2d 125, affirmed, 348 U.S. 170, and that that case presented "facts identical in all material respects to those in the instant case." But the jurisdictional question was not brought to the attention of either the Tenth Circuit (since *Sullivan* was decided in that circuit after *Lujan*, jurisdiction would undoubtedly have been upheld) or this Court by the briefs of either party and neither court mentioned in its opinion that any question of jurisdiction was involved. While this Court could undoubtedly have noticed the lack of jurisdiction *sua sponte*, the fact that this question was overlooked hardly makes *Sullivan* a weighty precedent in support of petitioners' position. Perhaps the reason that this issue was overlooked is that the appeal was also timely taken from an order denying a motion to withdraw the plea of *nolo contendere* on the ground the the prosecutor had made false promises of leniency in exchange for the plea. See Rule 32(d) (Appendix, *infra*, pp. 46–47).

superfluity." Similarly, in *Bertone, supra,* 249 F. 2d at 159, the Third Circuit said that:

> * * * [I]f the defendant is right any motion for a new trial which is filed within 10 days after entry of judgment is timely and must be considered and granted or denied on its merits. This, however, would have the effect of writing out of Rule 33 the specific limitation that a motion for a new trial based on grounds other than newly discovered evidence "shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period." We cannot agree to a construction of Rule 37(a)(2) which would thus eliminate the 5-day limitation of Rule 33 and substitute a period which would always be at least 10 days and could be much longer than that. For example, in the present case a motion for a new trial filed within 31 days after verdict would have been timely, in the defendant's view.

In the instant case, by petitioners' contention, motions in arrest of judgment are timely even though filed three months after determination of their guilt.

In contrast, the position advanced by the government and adopted by the Third, Fifth, and Ninth Circuits harmonizes the provisions of Rules 33 and 34, on the one hand, and Rule 37, on the other. As the Third Circuit held in *Bertone, supra,* 249 F. 2d at 158:

> We think that the construction which the Government asks us to place upon Rule 37(a)(2) is the right one since it harmonizes

> the provisions of Rules 33 and 37(a)(2), giving full effect to each, and thus carries out what must have been the intent of the Supreme Court in promulgating both rules at the same time.

Rules 33 and 34 are given full effect, according to the government's construction, by limiting the time for motions for a new trial and arrest of judgment to the five-day period after conviction. The provision in Rule 37(a)(2) allowing an appeal within ten days after the denial of a motion for a new trial or in arrest of judgment, made within the ten-day appeal period after judgment, operates in at least three situations. First, the district court may impose sentence at the same time as conviction or before the five-day period for filing motions after conviction has run. See, *e.g.*, *Pugh* v. *United States*, *supra*. The defendant may then make valid motions under Rules 33 and 34 after sentence. Second, the district court may reserve decision on defendant's motions, made before sentence, until after sentence.[6] Third, the district court may grant an application of the defendant, timely made within the five-day period as provided by Rules 33 and 34, to extend the time for filing his motion for a new trial or in arrest of judgment. The sentence may be imposed before actual filing of

[6] By the literal words of Rule 37(a)(2), the ten-day period for appeal runs from the denial of the motion if the motion is filed within the ten days *after judgment*. We have no difficulty, however, in construing Rule 37 to allow an appeal within ten days after denial of the motion even though the motion is filed before sentence, and decision is reserved by the district court.

the motion for new trial or in arrest, and the motion itself may be filed within ten days of sentence. In all three instances, Rule 37(a)(2) provides that the time for appeal runs from the time the motion is denied, rather than from the time of sentencing.[1]

We submit that the position of the Third, Fifth, and Ninth Circuits is not only supported by the language and structure of the Rules, but is also the more reasonable approach. If defendants were permitted to delay filing a motion in arrest of judgment until after sentence—and then could delay filing notices of appeal until ten days after their motions were denied—this would substantially lengthen the time required to dispose of criminal cases. There is no reason for such delay since Rule 34 provides for motions in arrest of judgment only to challenge the jurisdiction of the court and the indictment—both issues which are apparent long before determination of guilt. But even if it is assumed, *arguendo,* that petitioners have advanced "powerful * * * arguments" for "greater flexibility with respect to the time for the taking of an appeal," this Court has

[1] Petitioner claims (Pet. Br. 16) that elimination of the word "seasonably," which was in an earlier draft of Rule 37(a)(2), from the final text indicates an intent to eliminate the requirement that a motion in arrest of judgment be timely filed under Rule 34. But the Advisory Committee Notes suggest no such intent to change prior procedure so substantially; rather, they simply state that the first sentence of Rule 37(a)(2)—which is the only relevant sentence here—"enlarges the time for taking an appeal from 5 days to 10 days." It appears, therefore, that "seasonably" was omitted because it was considered surplusage, in view of the existence of Rules 33 and 34.

found that the Rules "almost conclusively * * * show a deliberate intention to eliminate any power of the courts to extend the time for the taking of an appeal" and has therefore held that such policy questions "must be resolved through the rule-making process and not by judicial decision." *United States v. Robinson, supra* 361 U.S. at 228–229; see Rule 45(b).

B. THE COURT OF APPEALS HAD NO JURISDICTION EVEN IF PETITIONERS' MOTIONS IN ARREST OF JUDGMENT ARE CONSIDERED AS MOTIONS UNDER RULE 12(b) OR 28 U.S.C. 2255

As we have shown above (pp. 9–19), petitioners' time for appeal ran from the date of their sentence, not from the denial of their untimely motions in arrest of judgment, and therefore their notices of appeal were filed too late to confer jurisdiction on the court of appeals. Petitioners argue that, if that is so, their motions in arrest of judgment should be treated as motions under Rule 12(b) or 28 U.S.C. 2255. Their appeals, they claim, were filed within ten days of entry of the order denying these motions, as provided in Rule 37(a)(2).

1. *Rule 12(b).*—(a) Rule 12(b) (Appendix, *infra*, p. 46) provides that all defenses and objections "based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. * * * Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the

proceeding." However, petitioners' motions in arrest of judgment, made after conviction and sentence, were not filed "during the pendency of the proceeding."

The history of Rule 12(b) demonstrates that "during the pendency of the proceeding" refers to the period up to the time of conviction. Rule 12 was prescribed by this Court pursuant to the Act of June 29, 1940, c. 445, 54 Stat. 688. See 327 U.S. 821, 842–843. That Act authorized this Court to prescribe "rules of pleading, practice, and procedure with respect to any or all proceedings *prior to and including verdict, or finding of guilty* or not guilty by the court if a jury has been waived, *or plea of guilty,* in criminal cases in district courts of the United States * * *." 54 Stat. at 688 (emphasis added). The procedures after verdict, *i.e.,* after determination of guilt (see *supra,* pp. 10–13), are governed by Chapters VII and VIII of the Rules, entitled, respectively, "Judgment" and "Appeal." These Chapters, which include Rule 34, were promulgated under authority of the so-called Criminal Appeals Rules Act of 1933 which authorized this Court to prescribe "rules of practice and procedure with respect to any or all proceedings *after verdict, or finding of guilt* by the court if a jury has been waived, *or plea of guilty,* in criminal cases in district courts * * *." Act of February 24, 1933, c. 119, 47 Stat. 904, as amended, 18 U.S.C. (1946 ed.) 688 (emphasis added); see 327 U.S. 821, 856. Since Rule 12 can apply only *before* determination of guilt, the phrase "at any time during the pendency of the proceeding" in Rule 12 can refer only to the "proceedings

prior to and including verdict, or finding of guilty * * *."

Moreover, if Rule 12(b) allowed motions attacking the indictment or the jurisdiction of the court after conviction, the provision in Rule 34 for motions in arrest of judgment would be practically superfluous. That Rule allows a motion in arrest of judgment within five days after determination of guilt "if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged." Since the language of Rules 12 and 34 is virtually identical, it appears that Rule 12 (insofar as it relates to motions made after the pre-trial stage) and Rule 34 provide for motions having the same scope—that is, presenting allegations that the trial court lacks jurisdiction or the indictment fails to allege an offense. Thus, if petitioners' argument that a Rule 12(b) motion can be made after determination of guilt is accepted, any motion which could be made under Rule 34 only during the five days after conviction could instead be made during or after that period under Rule 12(b).

The only difference in the motions made under Rules 12 and 34 would be that, by the terms of Rule 37(a)(2), a defendant who has filed a timely motion in arrest of judgment does not have to file a notice of appeal on any aspect of the case until ten days after the motion is denied. In contrast, Rule 37 makes no provision for delaying the filing of a notice of appeal because a Rule 12(b) motion has been made, whether or not timely. Thus, by the terms of Rule 37(a)(2),

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the issues involved in the Rule 12(b) motion could be appealed by filing a notice of appeal within ten days of denial of that motion, but the issues not involved in the Rule 12(b) motion could be considered on appeal only if a notice of appeal from the conviction itself was filed within ten days of sentence.

This distinction between Rules 12 and 34 seems much too slight, however, to be the real basis for the formulation and adoption of Rule 34 specially providing for motions in arrest of judgment. There is nothing in the Advisory Committee Notes, nor anywhere else, suggesting that the sole purpose of Rule 34 was merely to allow defendants to delay their appeal on the entire case when motions attacking the indictment or the jurisdiction of the court were made within five days of conviction. Rather, the history of the Rule conclusively supports the more reasonable assumption that Rule 34 was intended to allow motions in arrest of judgment to attack the indictment or jurisdiction of the court *after conviction,* since Rule 12(b) did not provide for such motions.

Even if we are wrong and Rule 12 motions may be made after conviction, we submit that such motions cannot be made after sentence and final judgment. Once a judgment has become final, "the pendency of the proceeding" has ended.[8]

[8] The three lower-court cases relied on by petitioners (Pet. Br. 22) are admittedly inconsistent with the government's position. *Finn* v. *United States*, 256 F. 2d 304, 306 (C.A. 4), and *United States* v. *Holmes*, 110 F. Supp. 233, 234 (S.D. Tex.), concern motions in arrest of judgment made after conviction but before sentence, which were considered as Rule 12

(b) If, contrary to our contention, petitioners' appeal may be considered as taken under Rule 37(a)(2) from a denial of valid Rule 12(b) motions, a partial answer to petitioners' argument is that under Rule 37(a)(2) a valid Rule 12(b) motion, unlike a timely Rule 34 motion, does not toll the ten-day period during which an appeal from the sentence itself must be filed. The only issues before the court of appeals and this Court would be those questions which may be raised by a Rule 12(b) motion made after the pre-trial stage is over—whether the trial court had jurisdiction and whether the indictment charged an offense. As we will show below (pp. 34–35, 38), two of petitioners' contentions—whether the trial court sentenced petitioners on the basis of evidence adduced at another trial and whether the trial court's characterization of petitioners' offenses in the written judgment transmuted the felonies charged into misdemeanors—do not go to the jurisdiction of the trial court even though petitioners phrase them in jurisdictional terms. Thus, these two issues are not before this Court even if petitioners' motions are considered as validly made under Rule 12(b).

2. *28 U.S.C. 2255.*—(a) If petitioners' motions in arrest of judgment are considered as motions under 28 U.S.C. 2255 (Appendix, *infra*, pp. 44–45), the motions

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motions. In *Hotch* v. *United States*, 208 F. 2d 244, 250 (C.A. 9), the court of appeals relied on Rule 12 to consider an issue raised for the first time in that court. None of these cases, however, considers the history of Rule 12(b) or the superfluity of Rule 34 if Rule 12 motions may be made after conviction.

were nevertheless invalid. For 28 U.S.C. 2255, both in terms and as construed by this Court (*Heflin* v. *United States,* 358 U.S. 415, 418, 420–422), is available only to a person who is "in custody." Here petitioners were not in custody at the time they originally made the motions or at any subsequent time.

Petitioners, however, contend (Pet. Br. 24–25) they were at the time of their motions and still are in constructive custody since, if their appeals were untimely, they are not entitled to bail (citing *Black* v. *United States,* 269 F. 2d 38, 41 (C.A. 9), certiorari denied, 361 U.S. 938). But the fact remains that they are not in custody and therefore, as both Congress and this Court have decided, they are not entitled to the remedy provided in 28 U.S.C. 2255. Moreover, as the court of appeals noted (R. 115), they were not even in constructive custody at the time their motions in arrest of judgment were filed since the time for appeal from conviction and sentence had not run. While petitioners can bring an action under 28 U.S.C. 2255 as soon as they are committed to custody, there is no greater "circuity of actions" (Pet. Br. 25) than in any other situation where persons prematurely attempt to attack their conviction collaterally.

(b) Assuming, *arguendo,* that petitioners are correct and the instant case can be considered as a valid motion under 28 U.S.C. 2255, then, of course, the ordinary standards for collateral attack must be applied. As we will show below (*infra,* p. 26), petitioners' attack on the form of the indictment is not cognizable on collateral attack.

II

PETITIONERS' CONTENTIONS ARE WITHOUT SUBSTANCE ON THEIR MERITS

We have contended above (pp. 9–24) that the court of appeals was without jurisdiction of the instant case. Petitioners, however, contend that the court below and this Court have jurisdiction, either on direct appeal or by considering petitioners' motions in arrest of judgment as motions under Rule 12(b) or 28 U.S.C. 2255. In this Point, we respond to petitioners' claims on the merits. As to each of petitioners' substantive contentions, we will first discuss—assuming, *arguendo,* that this case involves an appeal from denial of valid motions made under Rule 12 (b) or 28 U.S.C. 2255—whether these contentions are properly within either Rule 12(b) or 28 U.S.C. 2255. We will then show that, even if this case were properly here on direct appeal, each of petitioners' substantive contentions is plainly without substance.

A. THE INDICTMENT AND BILL OF PARTICULARS SUFFICIENTLY APPRISED PETITIONERS OF THE NATURE OF THE OFFENSES CHARGED

Petitioners contend (Pet. Br. 25–38) that both the substantive and conspiracy counts are fatally defective in their failure to charge the essential elements of the offenses, and in their lack of specificity. More particularly, petitioners contend that the indictment (1) failed to allege any tax deficiency since it did not state how much tax the corporation paid during the year (Pet. Br. 28–31); (2) failed to allege petitioners'

knowledge of the existence of any tax deficiency (Pet. Br. 31–32); (3) failed to allege that petitioners filed the returns in question (Pet. Br. 37); (4) failed to particularize the role each petitioner played in the perpetration of the substantive and conspiracy offenses (Pet. Br. 38); and (5) failed to charge in the conspiracy count the basic elements of the substantive offense (Pet. Br. 33–34).

These contentions, even if correct, clearly are not sufficient to come within Rule 12 (as to motions made after the pre-trial stage) or 28 U.S.C. 2255. Rule 12(b), like Rule 34, provides by its specific terms only for motions which attack the jurisdiction of the trial court or which claim that the indictment has failed to charge an offense. Similarly, 28 U.S.C. 2255 provides for motions attacking jurisdiction of the trial courts or claiming that the indictment shows on its face that no offense could have been committed. *E.g.*, *Goto* v. *Lane*, 265 U.S. 393; *Marteney* v. *United States*, 216 F. 2d 760, 762 (C.A. 10). Here, it is clear that the indictment charged federal offenses; petitioners claim only that the indictment should have been more specific in order to apprise them of the precise offenses charged.

In any event, considering petitioners' contentions as if this Court had jurisdiction of their direct appeal, they are clearly without merit. Section 145 of the Internal Revenue Code of 1939 and Section 7201 of the Internal Revenue Code of 1954 (Appendix, *infra*, pp. 43–44) punish "any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter [title] or the payment

thereof * * *." The substantive counts (R. 1–6), with appropriate variations as to dates and amounts, alleged that petitioners were officers and employees of Farnsworth & Chambers Company, Inc., that they and their co-defendants "did wilfully and knowingly attempt to evade and defeat a large part of the taxes due and owing" by the corporation for each of the years involved, and that the attempted evasion was effected in the following manner: by (1) falsifying and altering corporate invoices, books and records; (2) concealing corporate assets; (3) diverting corporate net income; (4) concealing corporate income; and (5) preparing and mailing a false and fraudulent corporate income tax return. In addition, the substantive counts alleged that the return filed for each year reported that the corporation had earned a specifically designated amount of net income upon which it owed a specifically designated amount of tax, "whereas, as * * * [petitioners] then and there well knew the net income of the corporation" was a substantially greater amount (which was specifically designated), "upon which said net income the corporation owed * * * a total tax" of a specifically designated amount. The conspiracy count (R. 6–10) alleged that petitioners and their co-defendants engaged in a continuing conspiracy, from about January 1, 1950, to the date of the return of the indictment March 14, 1955, "to violate Section 145(b) of the Internal Revenue Code of 1939 * * * and Section 7201 of the Internal Revenue Code of 1954 * * *" by attempting "to evade and defeat a large part of the income taxes due and owing * * * by [the corporation]

for the calendar years of 1951, 1952, 1953, and 1954"; that it was part of the conspiracy to falsify books and records, to approve false invoices, to conceal purchases of corporate assets by representing that payments for "such assets were for rentals, repair expenses, parts expenses and materials used in construction work * * *," and to alter "the true records of the corporation for the purpose of concealing [its] true net income"; and, finally, that twenty-six specifically described overt acts (R. 8–10) were committed "in furtherance of the object, design and purpose of such conspiracy."

The United States voluntarily furnished a bill of particulars (R. 11–13) specifying that proof of unreported net income would be on the "specific items" basis and that the evasion of taxes for the years in question resulted in part from the following: (1) "the omission of income * * * from * * * construction and related activities, including but not limited to building roads, grading ditches, building driveways, building a swimming pool, clearing timber and/or the sale of same—all in the approximate amount of $71,136.00 * * *"; (2) "the over statement of construction costs and expenses * * * by allocation of personal expenditures of all defendants and other corporate executives * * * to corporate construction costs and expenses, in the approximate amount of $324,877.00 * * *"; (3) "the concealment of assets acquisitions, by showing them on their books and records as construction costs and expenses * * *"; (4) the deduction "as construction costs and expenses * * * of expenditures * * * for other corporations in the approximate amount of $525,643.00"; and (5) "the

acquisition of corporate assets * * * under the subterfuge of paying corporate expenses and construction costs." The trial court denied petitioners' motion for a supplemental bill of particulars (R. 13–15).

Manifestly, the indictment charged the substantive and conspiracy offenses in the language of the evasion statutes (Section 145(b) of the 1939 Code and Section 7201 of the 1954 Code) and of the conspiracy statute (18 U.S.C. 371, Appendix, *infra*, p. 44). Accordingly, on its face it sufficiently charged the offenses to which petitioners pleaded (*United States* v. *Lepowitch*, 318 U.S. 702, 704; *Ekberg* v. *United States*, 167 F. 2d 380, 387 (C.A. 1)), with further details to be provided, in the court's discretion, through a bill of particulars. The evasion counts of the indictment not only charged all of the essential elements of the offenses but did so in detail exceeding that of indictments approved repeatedly, over a long period of time, by numerous lower federal courts.[9] Although the indictment need not allege the manner of attempted evasion (*Reynolds* v. *United States*, 225 F. 2d 123, 126 (C.A. 5); *Heasley* v. *United States*, 218 F. 2d 86, 88–89 (C.A. 8), certio-

[9] *Rick* v. *United States*, 161 F. 2d 897, 898–899 (C.A. D.C.); *Gaunt* v. *United States*, 184 F. 2d 284, 288 (C.A. 1); *Reynolds* v. *United States*, 225 F. 2d 123, 126 (C.A. 5); *Guzik* v. *United States*, 54 F. 2d 618, 619 (C.A. 7), certiorari denied, 285 U.S. 545; *United States* v. *Rosenblum*, 176 F. 2d 321, 329–330 (C.A. 7); *Cave* v. *United States*, 159 F. 2d 464, 466–467 (C.A. 8); *Remmer* v. *United States*, 205 F. 2d 277, 281 (C.A. 9); *Legatos* v. *United States*, 222 F. 2d 678, 681 (C.A. 9); *Samish* v. *United States*, 223 F. 2d 358, 366 (C.A. 9); *United States* v. *American Stevedores*, 16 F.R.D. 164, 168–169 (S.D. N.Y.); *United States* v. *Carpenter*, 175 F. Supp. 362, 364 (N.D. Ga.); *United States* v. *Trownsell*, 117 F. Supp. 24, 25 (N.D. Ill.); *United States* v.

rari denied, 350 U.S. 882; *United States* v. *Rosenblum*, 176 F. 2d 321, 324 (C.A. 7)), this indictment set forth, specifically, a multiplicity of means. There is no basis in the statutes, in decisional law, or in reason for petitioners' assertion (Pet. Br. 35–37) that an indictment charging the attempted evasion of corporate taxes requires greater specificity than one charging the attempted evasion of individual income taxes.[10] Clearly, the detailed allegations in the first four substantive counts of the indictment—as did the equally detailed allegations in the fifth count of the steps taken to consummate the conspiracy—constituted "plain, concise and definite" statements of the respective offenses (Rule 7(c)) which together with the bill of particulars fully apprised petitioners of the nature of the charges to which they were called upon to respond.

Petitioners' specific allegations are also clearly without merit:

(1) They claim (Pet. Br. 28–31) that the indictment was invalid because it failed to state how much tax the

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Bahcall, 116 F. Supp. 869 (N.D. Ill.); cf. *Mangiaracina* v. *United States*, 10 F.R.D. 415, 416 (W.D. Mo.).

Such indictments, with considerably less detail than those here, have also been involved in several cases before this Court. *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 44–45; *Holland* v. *United States*, 348 U.S. 121, 125; cf. *Achilli* v. *United States*, 353 U.S. 373; *Troy* v. *United States*, 293 U.S. 58.

[10]Petitioners state as the primary basis for the distinction between individual and corporate taxes (Pet. Br. 35) that "[n]o corporate officer or employee is necessarily in a position to know what the income of the corporation is * * *." Here, however, the indictment specifically charged that petitioners did know the correct income of the corporation (R. 1–6).

corporation paid for each tax year. The gist of the offense defined by Sections 145(b) and 7201 is the wilful *attempt* to evade and defeat the tax (Congress has not made evasion, *per se*, an offense). The offense is complete when, with the requisite wilfulness, a false and fraudulent return has been filed, understating net income and tax liability—the situation described in considerable detail in the first four counts of the indictment here. The amount of tax paid is immaterial except insofar as it relates to the proof at trial of the deficiency alleged in the indictment. See *Lawn* v. *United States*, 355 U.S. 339, 360–361. In other words, the amount of payment is relevant to the question of the sufficiency of the evidence to sustain conviction, not to the validity of the indictment.

(2) Petitioners contend (Pet. Br. 31–32) that the indictment failed to allege that they had knowledge of the existence of any tax deficiency. The indictment, however, alleged that petitioners "did wilfully and knowingly attempt to evade and defeat" the tax, that they prepared or caused to be prepared a false and fraudulent corporate return, and that the return understated the net income of the corporation which "they then and there well knew" was a higher amount (R. 1–6). These allegations charge that petitioners had knowledge that tax returns were being filed understating corporate income and the tax due. Here, also, greater specificity is not required in the indictment but is a matter of proof at trial.

(3) The assertion (Pet. Br. 37) that the indictment failed to allege that petitioners *filed* the tax returns—even assuming, *arguendo*, that such an allegation was

required—is frivolous. Each count alleged that petitioners "did wilfully and knowingly attempt to evade and defeat a large part" of the corporation's tax by, *inter alia,* "preparing and causing to be prepared, and mailing and causing to be mailed at Houston, Texas, a false and fraudulent" return on behalf of the corporation "which was filed * * * with the Collector of Internal Revenue * * *" (R. 1–6). Thus, each count in effect alleged that petitioners filed the returns. In any event, a similar indictment has been upheld on the ground that an allegation of mailing even without an allegation of filing is sufficient. *United States* v. *Albanese,* 224 F. 2d 879, 881–882 (C.A. 2), affirming 117 F. Supp. 736, 737 (S.D. N.Y.), certiorari denied, 350 U.S. 845.

(4) The complaint (Pet. Br. 38) that the indictment "in no way distinguishes the accusations against any one individual from the accusations against the others" ignores the effect of 18 U.S.C. 2, which provides that aiders and abettors are punishable as principals. An indictment need not specify whether a particular defendant is a principal or an accessory. *Jin Fuey Moy* v. *United States,* 254 U.S. 189; *Greenberg* v. *United States,* 297 Fed. 45 (C.A. 8); *O'Brien* v. *United States,* 25 F. 2d 90 (C.A. 7); *Swanne Soon Young Pang* v. *United States,* 209 F. 2d 245 (C.A. 9). Moreover, since omission of the means of attempted evasion is not fatal to an indictment (*supra,* pp. 29–30), the failure to specify which of a number of defendants committed particular acts constituting the means is, *a fortiori,* not fatal. In short, here again, the pre-

cision petitioners seek concerning the specific part played by each defendant is a matter for proof at trial.

(5) Lastly, petitioners contend (Pet. Br. 33–34) that the conspiracy count failed to allege all the basic elements of the substantive offense, particularly the existence of the tax deficiency and petitioners' knowledge of the deficiency. But "it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy, *Williamson* v. *United States*, 207 U.S. 425, 447, or to state such object with the detail which would be required in an indictment for committing the substantive offense * * *. In charging such a conspiracy 'certainty to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is necessary.' *Williamson* v. *United States, supra* * * *." *Wong Tai* v. *United States*, 273 U.S. 77, 81.

The conspiracy count here did far more than merely identify the offense which petitioners conspired to commit. It not only alleged that petitioners engaged in a continuing conspiracy "to violate Section 145(b) of the Internal Revenue Code of 1939 * * * and Section 7201 of the Internal Revenue Code of 1954 * * *," but went on to charge in substantially the same language as these two sections that the purpose of the conspiracy was "[t]o wilfully attempt to evade and defeat a large part of the income taxes due and owing" by the corporation (R. 6–7). The count then specified various means used to effectuate the conspiracy, such as the falsification of books and

records, the approval of false invoices, and alteration of the records of the corporation to conceal its net income (R. 7).

While *Wong Tai* holds that elements of the substantive crime need not be alleged in the indictment, the conspiracy count here alleges all the elements of the substantive offenses. As we have shown above with regard to the substantive offenses (p. 31), the allegations in the conspiracy count, while general, charge the existence of a tax deficiency and the knowledge of it by petitioners. With regard to the conspiracy count even more than as to the substantive allegations, further specification of these elements of the offense is a matter of proof at the trial.

B. THE TRIAL COURT CONVICTED AND SENTENCED PETITIONERS UPON THEIR PLEAS OF *NOLO CONTENDERE*

Petitioners contend (Pet. Br. 39–53) that they were convicted and sentenced on the testimony adduced at the trial of their co-defendants and that therefore the trial court lost jurisdiction to convict and sentence them. If the court below and this Court have jurisdiction only by treating petitioners' motions as made under Rule 12(b) (but see *supra*, pp. 19–22), petitioners' contention is clearly not before the Court. For, although petitioners have phrased this contention in terms of jurisdiction, the actual issue concerns the evidence on which petitioners were sentenced and convicted. If they were sentenced on evidence adduced at the trial of their co-defendants,

they may have been deprived of their rights under the Sixth Amendment, but the district court nevertheless had jurisdiction. Jurisdiction is not lost merely because a court acts erroneously or even unconstitutionally. On the other hand, if petitioners' motion in arrest of judgment could properly be treated as a motion under 28 U.S.C. 2255 (but see *supra,* pp. 23–24), the issue is properly before the Court. That statute allows not only motions challenging the jurisdiction of the trial court but also motions contending "that the sentence was imposed in violation of the Constitution * * *."

Assuming, *arguendo,* that this issue is properly here, it is directly contrary to the facts as shown by the record. The court of appeals succinctly pointed out what occurred during the proceedings for sentencing on June 19, 1959 (R. 112–113): "the court heard statements of [petitioners'] counsel * * * seeking mitigation of punishment"; there were frequent references in these statements "to matters which transpired at the trial of the other defendants", petitioners' counsel having "had a representative at the trial, taking notes, and reporting * * * so that they knew * * * 'exactly what was testified, in substance' "; two of the three petitioners made statements on their own behalf; and seventeen character witnesses testified. At the conclusion of the hearing, the district court stated, "I have found each guilty of the felonies as contained in the grand jury indictment", and imposed the sentences (R. 60). On June 22, 1959, the

court entered formal judgments and commitments (following Form 25 of the Appendix of Forms to the Federal Rules of Criminal Procedure), which, as to each petitioner, stated, "It is Adjudged that the defendant has been convicted upon his plea of nolo contendere * * *" (R. 61, 63, 65).

In short, while the court occasionally referred to the trial of petitioners' co-defendants, the large majority of the references were by petitioners' counsel to which the court replied (see, *e.g.*, R. 47–48, 53, 55). Although petitioners now claim (Pet. Br. 52) that the evidence adduced at the other trial cannot even be considered for purposes of sentencing, at the sentencing proceeding they obviously believed and acted on the principle that the evidence was relevant for purposes of sentencing. See *United States* v. *Norris,* 281 U.S. 619, 622–623. There is nothing in the record to suggest that the trial court improperly used this evidence to determine petitioners' guilt, particularly since the pleas of *nolo contendere,* which had been accepted by the court, fully determined their guilt. And the judgments, shown by the record to be based on petitioners' own pleas, are entitled to the presumption of regularity that attaches to a judgment of conviction following entry of a guilty plea. See *Davis* v. *United States,* 226 F. 2d 834, 836 (C.A. 8).

Moreover, despite the court's few references to the other trial, petitioners made no motion to withdraw their pleas under Rule 32(d) before sentence was imposed. They cannot, having relied throughout on

the advantages of *nolo contendere* pleas,[11] seek to withdraw them when they found that their sentences were more than they expected. Cf. *Johnson* v. *United States*, 318 U.S. 200–201.[12]

C. THE DESCRIPTION OF THE OFFENSES IN THE WRITTEN JUDGMENTS ENTERED BY THE TRIAL COURT, CORRECTIBLE UNDER RULE 36 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, CANNOT TRANSMUTE THE FELONIES CHARGED IN THE INDICTMENTS INTO MISDEMEANORS

Petitioners finally contend (Pet. Br. 53–55) that, since the written judgments stated that they were guilty of misdemeanors, imposition of the sentences

[11] As one of petitioners' principal counsel stated at the hearing on sentence, "there are wonderful advantages to [a plea of *nolo contendere*]. If I were doing it today I would do just exactly that, I would advise these clients of ours to do precisely what they did * * *. They are standing by it and so am I" (R. 46).

[12] Nor is there any merit in petitioners' complaint (Pet. Br. 39, 51–52) that there was unreasonable delay in imposing the sentences three months after their pleas. It is not unusual, in a case involving a number of defendants, for some to enter pleas of guilty or *nolo contendere* before trial, and to be sentenced after trial of the remaining defendants. And it is generally desirable to have the same judge sentence all participants in one offense or series of related offenses. *United States* v. *Bishop*, 76 F. Supp. 866 (D. Ore.). Petitioners did not request imposition of sentence prior to the conclusion of the trial of their co-defendants. Cf. *Kaye* v. *United States*, 235 F. 2d 187 (C.A. 6); *Caldwell* v. *United States*, 36 F. 2d 738 (C.A. 10), certiorari denied, 281 U.S. 725. The sentences were imposed in June 19, 1959 (R. 60–61), shortly after the trial of the co-defendants had been concluded on June 9 (Pet. Br. 5). See *Miller* v. *Aderhold*, 288 U.S. 206, 210–212, holding that delay in imposing sentence, regardless of the length of the delay, does not deprive the trial court of jurisdiction, at least where the defendant raises no objection.

for felonies was beyond the jurisdiction of the district court. Here also (cf. *supra,* pp. 34–35), although petitioners' argument is phrased in terms of jurisdiction, their actual claim is that the district court imposed an impermissibly long sentence. Since this issue does not concern the jurisdiction of the district court or the indictment, it is not cognizable under Rule 12(b). Therefore, the court of appeals and this Court are without jurisdiction of this issue even if we consider petitioners' motions in arrest of judgment as valid motions under Rule 12(b) (but see *supra,* pp. 19–22). If their motions are considered as valid under 28 U.S.C. 2255 (but see *supra,* pp. 23–24), this issue is cognizable by the court below and this Court since that statute provides for collateral attack based on the claim "that the sentence was in excess of the maximum authorized by law * * *" (see Appendix, *infra,* p. 44).

Assuming, *arguendo,* that this issue is properly before the Court on direct appeal, it is nevertheless without merit. The indictment returned against petitioners plainly charged felony offenses in violation of Section 145(b) of the Internal Revenue Code of 1939, Section 7201 of the Internal Revenue Code of 1954, and 18 U.S.C. 371 (R. 1–10). Petitioners unequivocally pleaded *nolo contendere* to felonies (R. 17–27, 30–39). The trial court, sentencing petitioners, found "each guilty of the felonies as contained in the Grand Jury indictment" (R. 60). The notices of appeal explicitly refer to the offenses to which petitioners entered pleas of *nolo contendere* as attempted evasion

of corporate taxes and conspiracy to commit the substantive offenses in violation of the above-mentioned felony statutes (R. 74, 81).

Petitioners rely on the trial court's characterization of the offenses in the written judgments as (1) "the offense of filing false and fraudulent corporate income tax returns" and (2) "conspiring to file false and fraudulent corporate income tax returns" (R. 61–62, 63, 65). Petitioners claim that this language describes offenses under Section 145(a) of the 1939 Code and Sections 7203 and 7207 of the 1954 Code,[13] which are misdemeanors. It is apparent that the trial court, by way of abbreviation, was attempting to describe the offense of attempted evasion by equating it with the alleged means of committing the offense.[14] (see R. 61–65). Moreover, the language relied upon by petitioners is immediately followed in the written judgments by the specific statement that petitioners violated the felony provisions covering wilfully attempted evasion—Section 145(b) of the 1939 Code and Section 7201 of the 1954 Code. The judgments make no specific reference to the misdemeanor provisions of either the 1939 or 1954 Code. And all of the petitioners were given sentences exceeding one year, sentences which were appropriate for conviction of felonies but not misdemeanors.

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[13] However, a comparison of the language in the judgments and Sections 145(a) of the 1939 Code and 7203 of the 1954 Code shows clearly that the judgments did not relate to those sections.

[14] This Court in *Sullivan* v. *United States*, *supra*, 348 U.S. at 170–171, similarly characterized a felony offense under Section 145(b) of the 1939 Code.

In the circumstances, it is clear that petitioners were convicted and sentenced for felonies. First, the oral, not the written, sentence governs if the two are in conflict. Only if the oral sentence is ambiguous can other materials, such as the written judgment, be used to ascertain the intent of the court at the time of sentence. Here the oral sentences were unambiguous.

Second, even if the oral sentences were ambiguous and the written judgments are considered as evidence of the sentencing court's intent, it is still clear that petitioners were convicted and sentenced for felonies. While the written judgments conceivably describe misdemeanor offenses, they specifically state that petitioners violated the felony provisions. If the written judgments are construed mostly favorably to petitioners, they are ambiguous and internally inconsistent. And considering all the circumstances, the general descriptions of the offenses in the written judgments are the only suggestion in the record that misdemeanors were involved. This evidence is surely not sufficient to overcome the overwhelming evidence to the contrary—that the intent of the district judge was to sentence petitioners for the felonies for which they were indicted.

The description of the offenses in the written judgments in terms of the misdemeanor offenses was ~~undoubtedly~~ nothing more than a clerical error. If petitioners want the written judgments to be corrected, they can call the error, if it is one, to the attention of the trial court by motion under Rule 36 (Appendix, *infra*, p. 47), which allows clerical errors in judgments

to be corrected by the sentencing court at any time. *Costello* v. *United States*, 252 F. 2d 750, 751 (C.A. 5); *Tseung Chu* v. *Cornell*, 247 F. 2d 929, 932 (C.A. 9); *Ex parte Sherwood*, 177 F. Supp. 411, 413 (D. Ore.), certiorari denied, 363 U.S. 851.

If petitioners' motions in arrest of judgment are considered as valid motions under 28 U.S.C. 2255 (but see *supra*, pp. 23–24), the written judgments may be entitled to greater weight. In our brief in *Payne* v. *Madigan*, No. 180, this Term, and *Young* v. *United States*, No. 184, this Term (pp. 27–28), we have argued that in a habeas corpus proceeding the accuracy of written judgments cannot be impeached. This argument results in large part from the inappropriateness of allowing courts other than the sentencing court to look beneath the written judgment. Therefore, this argument probably would not apply to a motion under 28 U.S.C. 2255 in the sentencing court. If, however, the written judgments are considered as binding here, they are at most ambiguous. Construing the judgments most favorably to petitioners, one portion indicates that petitioners ~~were~~ were sentenced for misdemeanors, while other portions indicate that the court was sentencing petitioners for felonies. In this situation, petitioners are not entitled to relief on the basis of the judgments alone; the ambiguity of the judgments can only be resolved by looking to the oral sentences. The oral sentences, as well as all the other indications from the proceedings, make clear that petitioners were convicted and sentenced for felonies.

CONCLUSION

We respectfully submit that the judgment below should be affirmed.

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MARCH 1961.

APPENDIX

INTERNAL REVENUE CODE OF 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. (1952 ed.) 145)

INTERNAL REVENUE CODE OF 1954:

SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned

not more than 5 years, or both, together with the costs of prosecution.

(26 U.S.C. 7201)

---

18 U.S.C.:

SEC. 371. *Conspiracy to commit offense or to defraud United States.*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

---

28 U.S.C.:

SEC. 2255 [as amended by Sec. 114, Act of May 24, 1949, c. 139, 63 Stat. 89]. *Federal custody; remedies on motion attacking sentence.*

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

FEDERAL RULES OF CRIMINAL PROCEDURE:

Rule 12. Pleadings and Motions before Trial; Defenses and Objections.

* * * * *

(b) *The Motion Raising Defenses and Objections.*

* * * * *

(2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

* * * * *

Rule 32. Sentence and Judgment.

(a) *Sentence.* Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

* * * * *

(d) *Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the

court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

* * * * *

Rule 33. New Trial. The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

* * * * *

Rule 34. Arrest of Judgment. The court shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 5 days after determination of guilt or with such further time as the court may fix during the 5-day period.

Rule 36. Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

Rule 37 [as amended April 12, 1954]. *Taking Appeal; and Petition for Writ of Certiorari.*

(a) *Taking Appeal to a Court of Appeals.*

* * * * *

(2) *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from,

but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

* * * * *

Rule 45. Time.

* * * * *

(b) *Enlargement.* When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal.

CRIMINAL APPEALS RULES OF 1933:

I [as amended May 24, 1937]. *Sentence.*—After a plea of guilty, or a verdict of guilt by a jury or finding of guilt by the trial court where a jury is waived, and except as provided

in the Act of March 4, 1925, c. 521, 43 Stat. 1259, sentence shall be imposed without delay unless (1) a motion for the withdrawal of a plea of guilty, or in arrest of judgment or for a new trial, is pending, or the trial court is of opinion that there is reasonable ground for such a motion; or (2) the condition or character of the defendant, or other pertinent matters, should be investigated in the interest of justice before sentence is imposed. The judgment setting forth the sentence shall be signed by the judge who imposes the sentence and shall be entered by the clerk.

Pending sentence, the court may commit the defendant or continue or increase the amount of bail.

II. *Motions.* * * *

(2) Save as provided in subdivision (3) of this Rule, motions in arrest of judgment, or for a new trial, shall be made within three (3) days after verdict or finding of guilt.

* * * * *

III. *Appeals.* An appeal shall be taken within five (5) days after entry of judgment of conviction, except that where a motion for a new trial has been made within the time specified in subdivision (2) of Rule II, the appeal may be taken within five (5) days after entry of the order denying the motion.

Petitions for allowance of appeal, and citations, in cases governed by these rules are abolished.

Appeals shall be taken by filing with the clerk of the trial court a notice, in duplicate, stating that the defendant appeals from the judgment, and by serving a copy of the notice upon the United States Attorney. The notice of appeal shall set forth the title of the case, the names and addresses of the appellant and

appellant's attorney, a general statement of the nature of the offense, the date of the judgment, the sentence imposed, and, if the appellant is in custody, the prison where appellant is confined. The notice shall also contain a succinct statement of the grounds of appeal and shall follow substantially the form hereto annexed.

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No. 238

In The

Supreme Court of the United States

October Term, 1960

H. A. Lott, Lee Blocker and Loren D. Frazier,
Petitioners,

v.

The United States of America,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONERS

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No. 238

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

H. A. LOTT, LEE BLOCKER AND LORN D. FRAZIER,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

PRELIMINARY STATEMENT

Practically all contentions raised in the Government's brief are completely answered in the original brief for Petitioners. This reply brief will be limited to a few points in rebuttal, with repetition of matters covered in the original brief being avoided.

REPLY TO GOVERNMENT'S ARGUMENT

f.

The notices of appeal were timely filed (Reply to U.S. Br. pp. 9-24):

1. The notices of appeal were filed within the time limits plainly prescribed by Rule 37(a)(2).

There is no satisfactory answer to Petitioners' reliance upon the unequivocal language of Rule 37(a)(2). The essence of the Government's argument is that, when there is ambiguity or conflict among various Rules of Criminal Procedure, the rules should be "harmonized" in a manner which would limit and restrict the important right of appeal — rather than be "harmonized" in an equally logical manner which would resolve the ambiguity or conflict in favor of the appeal and adhere to the plain terms of the rules. Justice requires the latter approach.

It is apparent that the Government's position is both complex and unreasonable, rather than simple and fair as required by Rule 2. Furthermore, even if the Government's argument on "harmony" were well taken, the price for harmony is too high if it can be had only at the expense of simplicity in the administration of criminal justice — particularly when it creates a virtual trap for the accused, as would be the case here.

2. Entry of the pleas of nolo contendere did not constitute a "determination of guilt."

No case has been found which holds that a plea of *nolo contendere* constitutes a "determination of guilt" within the meaning of Rule 34. It is not even clear that a plea of guilty would constitute a "determination of guilt", within the meaning of such rule. But, in any event, the record

in this case shows that there was *no* "determination of guilt" in any sense until after the Farnsworth trial, when sentences were pronounced. The District Judge in legal effect rejected the pleas of *nolo contendere* and made his "determination of guilt" on the basis of evidence adduced at the Farnsworth trial. Since the *nolo* pleas were rejected, they could not constitute a "determination of guilt."

The Government's reliance, U.S. Br. 12, upon the Notes of the Advisory Committee under Rule 34, to the effect that it "continues existing law except that it enlarges the time for making motions in arrest of judgment from 3 days to 5 days," is misplaced. With respect to its Notes, the Advisory Committee stated:

> "The Notes are not to be regarded as a part of the Rules. They have been prepared without supervision or revision by the Supreme Court, and are not approved or sponsored by the Court. They have no official sanction and are intended merely as suggestions and guides."[1]

The Government's argument, U.S. Br. 15, that Petitioners' construction "would mean that Rule 37 has in effect rendered the five-day limits of Rules 33 and 34 without any meaning at all" is entirely fallacious. Plainly, the 10-day period — *specifically* provided by Rule 37(a)(2) — is necessarily applicable only for the *limited purpose* of determining the timeliness of an appeal under Rule 37(a)(2). For all other purposes, the 5-day limits of Rules 33 and 34 may properly be deemed controlling.

[1] Introductory statement by the Advisory Committee contained in Senate Document No. 175, 79th Congress, 2d Session, ordered to be printed April 26, 1946, Rules of Criminal Procedure for the District Courts of the United States, adopted by the Supreme Court of the United States, together with Notes to the Rules as prepared under the direction of the Advisory Committee on Rules for Criminal Procedure appointed by the Supreme Court of the United States, United States Government Printing Office, 1946.

3. In any event, the appeals were timely under Rule 12(b)(2).

The Government's argument, U.S. Br. 19-23, that Rule 12(b)(2) is inapplicable, is in flagrant opposition to the plain terms of the rule — like its argument directed at Rule 37(a)(2). Rule 12(b)(2) requires that failure of the indictment to charge an offense "shall be noticed by the court at any time during the pendency of the proceeding." This is not difficult or ambiguous language of the sort which calls for *interpretation* by reference to history or background. Clearly a proceeding is "pending" until a judgment entered therein is either affirmed by the Supreme Court or becomes final by expiration of the time for appeal. *Hotch* v. *United States*, 208 F. 2d 244, 250 (9 Cir. 1953); *Twentieth Century-Fox Film Corp.* v. *Brookside Theatre Corp.*, 194 F. 2d 846, 858 (8 Cir. 1952), *cert. den.* 343 U.S. 942; cf. *Snyder* v. *Buck*, 340 U.S. 15, 20 (1950); *Gulf Refining Co.* v. *United States*, 269 U.S. 125, 137 (1925); *Mackenzie* v. *Engelhard Co.*, 266 U.S. 131, 142-143 (1924). In this case the "motions in arrest of judgment" were made well before the judgments could possibly have become final by expiration of the time for appeal, since they were made 1 day after entry of the judgments and 4 days after the sentences were pronounced (R. 60-66, 68).

The fact that the Act of June 29, 1940, c. 445, 54 Stat. 688, was mentioned in the order of this Court adopting Rules 1 through 31 is not of controlling significance. See 323 U.S. 821. The language of the last sentence of Rule 12(b)(2) is clear and unequivocal, and promulgation of it by this Court was authorized by the Criminal Appeals Rules Act of 1933, as amended, c. 119, 47 Stat. 904; 18 U.S.C. (1946 ed.) 688.

Frankly admitting that *all* the decided cases under Rule 12(b)(2) are against it, U.S. Br. 22n.8, the Government

argues that the decisions are wrong because under them Rule 12(b)(2) and Rule 34 cover the same ground, in part. The Government would have this Court disregard and, in effect, strike out the plain terms of one rule merely because another rule grants similar relief in more limited form. We say that both rules should be given effect; that a defendant is entitled to rely upon *either* rule when its plain terms are applicable to his situation.

4. Alternatively, the appeals were timely under 28 U.S.C. §2255.

The only case in point compels the conclusion that Petitioners were legally in "custody" for purposes of 28 U.S.C. §2255, if their direct appeals were not timely. *Black* v. *United States*, 269 F. 2d 38, 41 (9 Cir. 1959), *cert. den.* 361 U.S. 938. So much is conceded by the Government, U.S. Br. 24. *Black* is sound and well-reasoned authority — it should be followed by this Court.

II.

The indictment is insufficient (Reply to U.S. Br. pp. 25-34):

1. The indictment does not charge all the basic elements of the offense of attempted tax evasion.

The Government has utterly failed to come forth with any authority or tenable reasoning which would render the indictment valid in the face of its fatal failure to charge (1) existence of a tax deficiency *and* (2) knowledge thereof by the accused — essential elements of the offense. Lack of a direct and express charge of *either* element renders the indictment void. Being unable to find *any* allegation as to the amount of tax paid by the corporation, much less an allegation that there was an *underpayment* of tax, the Government argues, U.S. Br. 31, that the amount of payment —

and consequently existence of a deficiency — is an element which must only be proved at trial, and need not be charged in the indictment. That argument is without any foundation or authority. There is no conceivable basis for any distinction or difference between the basic elements of an offense which must be proved and the elements which must be charged in the indictment. *All* the basic or essential elements of an offense must be *both* charged in the indictment *and* proved at trial.

Equally fallacious is the Government's *unsupported* contention, U.S. Br. 33-34, that the conspiracy count is not required to allege the bare essential elements of the substantive offense alleged to be the object of the criminal conspiracy sought to be charged. In *Wong Tai* v. *United States*, 273 U.S. 77, 81 (1927), relied upon by the Government, it was stated only that the elements need not be charged with the "technical precision" required in an indictment for the substantive offense. That statement cannot be construed to countenance an *utter failure* to even mention essential elements of the substantive offense. Furthermore, in both *Wong Tai* and *Williamson* v. *United States*, 207 U.S. 425, 446-449 (1908), cited therein, it appears that the elements of the substantive offenses were charged in considerable detail, whereas the elements of a tax deficiency and knowledge thereof are wholly lacking in Count 5 of the instant indictment. Count 5 thus fails to charge an offense, *United States* v. *Strauss*, 283 F. 2d 155, 158 (5 Cir. 1960).

2. The indictment wholly fails to apprise the accused employees of the "nature and cause of the accusation" of attempted evasion of corporate income taxes within the meaning of the Sixth Amendment.

The Government's characterization of Petitioners' posi-

tion as a "claim only that the indictment should have been more specific in order to apprise them of the precise offenses charged" is wholly erroneous, as is its misplaced reliance upon the skeleton "bill of particulars" gratuitiously filed by the prosecution. U.S. Br. 26, 28. We are not complaining of mere lack of "specificity"; our position is that the indictment is *fatally defective* because of its failure to charge essential elements of the offense and its failure to comply with the Sixth Amendment. A fatally defective indictment cannot be cured by a bill of particulars under any circumstances. *Babb* v. *United States*, 218 F. 2d 538, 539 (5 Cir. 1955); *United States* v. *Lattimore*, 215 F. 2d 847, 850 (D.C. Cir. 1954); *White* v. *United States*, 67 F. 2d 71, 78 (10 Cir. 1933). The prosecutor cannot take the place of a grand jury. Cf. *Stirone* v. *United States*, 361 U.S. 212 (1960).

III.

Contrary to the Sixth Amendment, Petitioners were tried in absentia. By basing the convictions and sentences upon evidence adduced at the Farnsworth trial, the District Court rejected the pleas of nolo contendere and lost jurisdiction to convict and sentence Petitioners upon such pleas (Reply to U. S. Br. pp. 34-37).

Conceding that Petitioners "may have been deprived of their rights under the Sixth Amendment" if they were sentenced on evidence adduced at the Farnsworth trial, U.S. Br. 35, the Government states that the District Court nevertheless had jurisdiction. However, it fails to state how or under what authority the jurisdiction to convict and sentence Petitioners could have been retained, after their *nolo contendere* pleas were in legal effect rejected, when no pleas to the indictment were legally outstanding. We submit that jurisdiction was clearly lacking.

Admittedly the record does not necessarily compel the conclusion that Petitioners were sentenced solely upon the Farnsworth evidence. Nevertheless, the statements of the District Court and the prosecution, together with all the circumstances of the case, are *abundantly sufficient* to raise a reasonable inference that they were sentenced upon such evidence and were actually tried *in absentia*. We submit that any reasonable doubt on this score left by the unavoidably inadequate record should be resolved in Petitioners' favor.

IV.

Since the written judgments adjudged that Petitioners were convicted of misdemeanor offenses, imposition of prison sentences for felony offenses was beyond the jurisdiction of the District Court (Reply to U.S. Br. pp. 37-41).

The Government's unsupported contention that the language of the judgments does not describe an offense under Section 145(a) of the 1939 Code, or Section 7203 of the 1954 Code, U.S. Br. 39n.13, is wrong. A similar contention was squarely demolished in *United States* v. *McCue*, 160 F. Supp. 595, 599 (D.C. Conn. 1958):

> ". . . The test to be employed in determining whether or not the 145(a) violation is a lesser included offense in the 145(b) violation is whether or not it is possible to commit the greater offense without having first committed the lesser. [Citation omitted.]
>
> "Considering the misdemeanor offense in relation to the felony offense charged in each count of the indictment, the question is whether or not it is possible to attempt to evade federal income taxes by filing a false return without failing to supply correct information for the purpose of computation, assessment or collection of federal income taxes. It seems clear when the offenses are analyzed that 'failure to supply correct

information' is necessarily violated when 'attempt to evade by filing a false return' is violated. The Government at the hearing and in its memorandum has offered no explanation or examples of how the attempt to evade by filing a false return can be accomplished without, necessarily and as a material element thereof, also failing to supply correct information."

It is clear beyond any possible doubt that the language of the judgments precisely describes the misdemeanor offense set out in Section 7207 of the 1954 Code.

Although the Government, without citing authority, argues that the oral, not the written, sentence governs, it also states that in other cases before the Court this term (Nos. 180 and 184) it is maintaining that the accuracy of written judgments cannot be impeached. U.S. Br. 40, 41. Rule 32(b) clearly contemplates that judgments shall be written -- it even provides that "the judgment shall be signed by the judge."

CONCLUSION

WHEREFORE, Petitioners respectfully pray as in their first brief.

Respectfully submitted,

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March, 1961.

SUPREME COURT OF THE UNITED STATES

No. 238.—October Term, 1960.

H. A. Lott, et al., Petitioners, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 12, 1961.]

Mr. Justice Whittaker delivered the opinion of the Court.

This case is concerned with the timeliness of an appeal from a judgment of conviction and sentence in a criminal case under Rule 37 (a)(2) of the Federal Rules of Criminal Procedure.[1]

These three petitioners having been jointly indicted, with two others, on five counts in the United States District Court for the Southern District of Texas for willfully attempting and conspiring to evade the federal income taxes of their corporate employer,[2] entered, and

[1] "Rule 37

"TAKING APPEAL; AND PETITION FOR WRIT OF CERTIORARI

"(a) Taking Appeal to a Court of Appeals.

"(2) *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. . . ."

[2] The corporate employer and taxpayer was Farnsworth & Chambers Co., Inc. Petitioners were employee-officers of that corporation, and collectively owned approximately 7 percent of its issued and outstanding capital stock. The first four counts of the indictment

the court accepted pleas of *nolo contendere* on March 17, 1959. But the court decided that pronouncement of its judgment should await conclusion of the impending jury trial of the other two defendants.[3] Soon after the conclusion of that rather protracted trial, the court, on June 19, 1959, orally pronounced its judgment convicting petitioners and sentencing them to imprisonment.[4] Three days later, on June 22, formal judgment was prepared, signed by the judge and filed with the clerk. The next day, June 23, petitioners filed their separate "motion[s] in arrest of judgment."[5] Those motions were denied on July 13. Two days later, on July 15, petitioners filed their separate notices of appeal from the judgment to the United States Court of Appeals for the Fifth Circuit.[6]

On the Government's motion, that court dismissed the appeals as untimely under Rule 37 (a)(2). 280 F. 2d 24. It held, in effect, that, although there is no such express limitation in the Rules, the provisions of

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charged willful attempt to evade the corporation's income taxes for the years 1951, 1952, 1953 and 1954, respectively, and the fifth count charged a conspiracy to commit the four substantive offenses charged.

[3] The two codefendants who stood trial were Richard A. Farnsworth, Sr., and his son. They owned a major part of the corporation's capital stock. Their trial, which began on April 6, 1959, and continued through June 9, resulted in a verdict of acquittal of the son on all counts, and a failure of the jury to agree on any of the counts as to the father.

[4] Petitioners were sentenced to imprisonment—Blocker for three years, Lott and Frazier for two years, on each count, the sentences to run concurrently, and each was fined $20,000.

[5] Each of the motions in arrest prayed, *inter alia*, "that the judgment and sentence . . . be arrested and set aside, that the indictment . . . be dismissed, and that [there] be granted such other relief as justice may demand."

[6] Actually, only Lott appealed on July 15. Blocker and Frazier appealed two days later, on July 17.

Rule 34[1] impliedly modify and limit the provisions of Rule 37 (a)(2). And it concluded that, although "motion[s] . . . in arrest of judgment" had, in fact, "been made within the 10-day period" after entry of the judgment appealed from (Rule 37 (a)(2)), it cannot be so regarded under these Rules because the tender by petitioners and acceptance by the court of the pleas of *nolo contendere* on March 17 constituted the "determination of [their] guilt," and, inasmuch as the motions in arrest were not made "within 5 days after [that] *determination of guilt*" as required by Rule 34, it followed that, to be timely under Rule 37 (a)(2), the appeals had to "be taken within 10 days after entry of the judgment or order appealed from" (Rule 37 (a)(2)), or by June 30 or July 2—depending upon whether it was the oral pronouncement of June 19 or the formal entry of June 22 that constituted the judgment—and not "within 10 days after entry of the order denying the motion." (Rule 37 (a)(2).) 280 F. 2d, at 27–28. Because of a conflict between the circuits upon the question presented[2] and of its importance to the proper administration of the criminal Rules, we granted certiorari. 364 U. S. 813.

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[1] "*Rule 34. Arrest of Judgment.*

"The court shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the court may fix during the 5-day period."

[2] In accord with the decision below is *United States* v. *Bertone*, 249 F. 2d 156 (C. A. 3d Cir.). And see *O'Neal* v. *United States*, 264 F. 2d 809 (C. A. 5th Cir.); *Drown* v. *United States*, 198 F. 2d 999 (C. A. 9th Cir.); *Godwin* v. *United States*, 185 F. 2d 41 (C. A. 8th Cir.). To the contrary are *Lujan* v. *United States*, 294 F. 2d 171 (C. A. 10th Cir.); *Smith* v. *United States*, 253 F. 2d 462 (C. A. 10th Cir.); and see *Sullivan* v. *United States*, 212 F. 2d 125 (C. A. 10th Cir.), affirmed, 348 U. S. 170.

Buttressed by *Lujan* v. *United States*, 204 F. 2d 171 (C. A. 10th Cir.), and *Smith* v. *United States*, 273 F. 2d 462 (C. A. 10th Cir.), holding, on similar facts, that Rule 37 (a)(2) alone and unaffected by any other Rule prescribes the time within which an appeal must be taken to a Court of Appeals in a criminal case, and further buttressed by their belief that this Court, too, so held, even if *sub silentio*, in exercising jurisdiction, under facts virtually identical to those here, in *Sullivan* v. *United States*, 348 U. S. 170, petitioners point to the facts that Rule 37 (a)(2) is captioned "*Time for Taking Appeal*"; that it is the only Rule that purports to deal with the subject; that it does not speak of motions filed within five days, nor after "verdict or finding of guilty" (Rule 33), nor after "determination of guilt" (Rule 34)—whatever that term may mean—and makes no reference to timeliness, under any other Rule, of the motions of which it speaks, but that it simply says in plain and unmistakable language that "An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion . . . in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion." Then, after pointing to the admitted fact that their motions in arrest were "made within the 10-day period"—actually within three days—after entry of the judgment appealed from, and that they appealed on the second day after their motions were denied, petitioners strenuously insist that their appeals were timely. They contend that to hold their appeals to have been untimely, in these circumstances, would be to mutilate the plain language of Rule 37 (a)(2) and to make of it a trap even for the wary—including their experienced and competent counsel who were doing their best to protect petitioners' rights of appeal. And they insist that such a snare

should not be permitted to deprive one of the valuable right of an appeal upon which his liberty, or even his life, may well depend.

Though we are impressed by this demonstration and argument, as also by the legalisms of the Government's countervailing argument, and although recognizing, as we do, the obscurity, if not inconsistency, in these Rules that has been exposed by this case, we need not here decide whether Rules 33 and 34 modify Rule 37 (a)(2) so as to limit the time which it specifies for the taking of an appeal—but may and should leave that problem and its kindred ones, brought to the fore in this case, for resolution by the rule-making process.* *United States* v. *Robinson*, 361 U. S. 220—for we have concluded that it was the judgment of conviction and sentence, not the tender and acceptance of the pleas of *nolo contendere*, that constituted the "determination of guilt" within the meaning of Rule 34. And, inasmuch as the motions in arrest were "made within 5 days after [that] determination of guilt," as required by Rule 34, and thus, in any view, were also "made within the 10-day period" after entry of the judgment appealed from, as required by Rule 37 (a)(2), the appeal, taken "within 10 days after entry of the order denying the motion," was timely.

Although it is said that a plea of *nolo contendere* means literally "I do not contest it," *Piassick* v. *United States*, 253 F. 2d 658, 661, and "is a mere statement of unwillingness to contest and no more," *Mickler* v. *Fahs*, 243 F. 2d 515, 517, it does admit "every essential element of the offense [that is] well pleaded in the charge." *United*

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*In light of the confusion that has arisen under these Rules, as exposed by this case, it is hoped that those who advise the Court with respect to the exercise of its rule-making powers—more particularly of course the Judicial Conference of the United States (28 U. S. C. § 331) and the Advisory Committee on Federal Rules of Criminal Procedure—will give these problems their early attention.

States v. *Lair*, 195 F. 47, 52 (C. A. 8th Cir.). Cf. *United States* v. *Frankfort Distilleries*, 324 U. S. 293, 296. Hence, it is tantamount to "an admission of guilt for the purposes of the case," *Hudson* v. *United States*, 272 U. S. 451, 455, and "nothing is left but to render judgment, for the obvious reason that in the face of the plea no issue of fact exists, and none can be made while the plea remains of record." *United States* v. *Norris*, 281 U. S. 619, 623. Yet the plea itself does not constitute a conviction nor hence a "determination of guilt." It is only a confession of the well-pleaded facts in the charge. It does not dispose of the case. It is still up to the court "to render judgment" thereon. *United States* v. *Norris*, *supra*, at 623. At any time before sentence is imposed—*i. e.*, before the pronouncement of judgment—the plea may be withdrawn, with the consent of the court. Rule 32 (d), Fed. Rules Crim. Proc. Necessarily, then, it is the judgment of the court—not the plea—that constitutes the "determination of guilt." Apart from the opinion below, we have not been cited to any case, and have found none, that holds or even intimates the contrary.

In view of this disposition of the jurisdictional question, we need not decide petitioners' alternative contentions that their motions in arrest should be treated as motions under Rule 12 (b)(2) of the Federal Rules of Criminal Procedure (see *Finn* v. *United States*, 256 F. 2d 304, 306 (C. A. 4th Cir.); *Hotch* v. *United States*, 208 F. 2d 244, 250 (C. A. 9th Cir.); *United States* v. *Holmes*, 110 F. Supp. 233, 234 (D. C. S. D. Tex.)), or as motions to vacate sentences under 28 U. S. C. § 2255 (see *Marteney* v. *United States*, 216 F. 2d 760 (C. A. 10th Cir.); *Finn* v. *United States*, *supra*).

The judgment is reversed and the cause is remanded to the Court of Appeals for further proceedings not inconsistent with this opinion.

Reversed and remanded.

SUPREME COURT OF THE UNITED STATES

No. 238.—October Term, 1960.

H. A. Lott, et al., Petitioners, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 12, 1961.]

Mr. Justice Clark, with whom Mr. Justice Frankfurter, Mr. Justice Harlan and Mr. Justice Stewart join, dissenting.

The Court characterizes "determination of guilt," as used in Rule 34,[1] by the significant phrase, "whatever that term may mean." It then finds that the acceptance of a *nolo contendere* plea is not such a determination. I submit that this Court has held that acceptance of such a plea is a "determination of guilt," and that today's decision is not only contrary to prior cases, but is also out of tune with the long-accepted practice of both federal and state courts. Believing that it will result in such confusion as to the requirements of our Rules that the administration of criminal justice will be adversely affected, I must respectfully dissent.

At the time petitioners Blocker and Frazier offered their pleas (March 17), the Government objected to their acceptance by the court, as it did when Lott offered his (March 20). The court heard counsel and warned the parties of the seriousness of the charge, *i. e.*, that the charge was willful tax avoidance, that the plea was volun-

[1] Rule 34 states in pertinent part that "[t]he motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the Court may fix during the 5-day period."

tarily made without promises, and that the sentence might be five years' confinement in addition to a large fine. After being assured by each of the parties that he wished to enter his plea, the court accepted them. Orders were entered in the minutes of the court as to each defendant, accepting the pleas and directing that a "pre-sentence investigation" be undertaken "for sentence at conclusion of entire case." The delay as to sentence was occasioned by the awaited trial of two additional defendants who had pleaded not guilty. The record shows that on June 19, after that trial was concluded (one defendant being acquitted and the other having a hung jury), petitioners appeared in court "on the criminal action docket *for sentence* . . . ." (Emphasis added.) The court, in addressing the parties, said, "[a]ll three of you have entered a plea of nolo contendere, and *that is equivalent to a plea of guilty.*" (Emphasis added.) Neither counsel nor the parties made any comment on this characterization of their pleas. Thereafter, petitioners and their counsel made statements in mitigation, after which sentence was pronounced. At no time were any motions made for permission to withdraw the pleas. On June 22, the formal judgments and commitments on the sentences were entered and each petitioner filed a motion in arrest of judgment on the next day. It is these motions that the Court of Appeals held should have been filed within five days of the acceptance of the pleas of *nolo contendere* in March. The Court, however, holds that the crucial date on which the "determination of guilt" was made was the day of the judgment of conviction and sentence.[2] Since the motions in arrest came within five days there-

[2] Whether this date is June 19, when the court orally pronounced sentence, or June 22, when the court formally entered judgments and commitments, is not made clear for under the Court's rationale, these appeals would be timely if either date were considered that of the "determination of guilt."

after, the Court says they were timely under Rule 34, as were the appeals that followed, under Rule 37 (a)(2).[3]

Rule II (2) of the Criminal Appeals Rules, 1933, 292 U. S. 661, the predecessor of present Rule 34, stated that "motions in arrest of judgment shall be made within three days after verdict or finding of guilt." Certainly "verdict" referred to a jury verdict of guilt. A plea of guilty has always been considered the equivalent of a jury finding of guilty. See *United States* v. *Norris*, 281 U. S. 619 (1930); *United States* v. *Bradford*, 194 F. 2d 197. The same is true of a plea of *nolo contendere*. Our cases have long and consistently held that it, "like a plea of guilty, is an admission of guilt for the purposes of the case." *Hudson* v. *United States*, 272 U. S. 451, 455 (1926). As this Court said in *United States* v. *Norris*, *supra*, after its entry, "the plea of *nolo contendere* upon that question [of guilt or innocence] and for that case, was as conclusive as a plea of guilty would have been. The court was no longer concerned with the question of guilt, but only with the *character and extent of the punishment*. The remedy of the accused . . . was to withdraw, by leave of court, the plea of *nolo contendere* . . . ." At p. 623. (Emphasis added.)

Rule 34, the successor to Rule II (2), is likewise clear and unambiguous—it says the motion must be filed within five days of "determination of guilt," not the time

[3] While the Court does not place its decision solely on the language of Rule 37 (a)(2), it is well to note that under that Rule an appeal must be taken "within ten days after entry of the judgment." If, however, a motion "in arrest of judgment has been made within the ten day period" the appeal period is tolled until the motion is overruled. Petitioners argue that since their motions in arrest were filed within the "ten day period" subsequent to judgment and were not overruled until July 13, their appeals (filed July 17) are timely. I assume that the Court considers this contention—making Rule 34 mere surplusage—entirely untenable since it specifically refuses to pass upon it.

of judgment or sentence. The Court today, however, rewrites the Rule by holding that the judgment date is the controlling one. "[I]t is the judgment of the court . . . that constitutes the 'determination of guilt.'" *Ante*, p. —. It has, however, long been recognized that determination of guilt and entry of judgment are disparate. *United States v. Norris, supra;* Fed. Rules Crim. Proc., 32 (b). If the framers of the Rules had intended to have the time for filing the motion in arrest run from the date of judgment, they would have said so. Instead they said that Rule 34 "*continues existing law* except that it enlarges the time for making motions in arrest of judgment from 3 days to 5 days. See Rule II (2) of Criminal Appeals Rules of 1933, 292 U. S. 661."[4] (Emphasis added.) "Existing law" did not allow motions in arrest unless made within three days of "verdict or finding of guilt."

The majority notes petitioner's argument that *Sullivan* v. *United States*, 348 U. S. 170 (1954), supports today's decision "even if *sub silentio*." With due deference, I say it does not. No question of jurisdiction was raised or considered in that case, either in the Court of Appeals or in this Court.[5] The case dealt solely with the merits of motions to dismiss and to withdraw a plea of *nolo contendere* under Rule 32 (d) after sentence.

The Court attempts to bolster its decision by noting that a *nolo contendere* plea "does not constitute a conviction," that it "does not dispose of the case" and that "[i]t is still up to the court 'to render judgment' thereon." However, these statements are just as true when a guilty plea is accepted or the jury returns a verdict of guilty.

[4] S. Doc. No. 175, 79th Cong., 2d Sess. 56.

[5] Petitioner's plea of *nolo contendere* was entered on April 8 and immediately accepted by the court. His motion in arrest of judgment was filed on May 29 and denied on June 23. The District Court gave no reason for its denial. The appeal was filed June 23.

They certainly were equally true under former Rule II (2). The judgment sentencing and committing the defendant in each of these instances would still have to be entered. In actual practice, then, nothing more is left to be done by the court after accepting a *nolo contendere* plea than is necessary after accepting a guilty plea or after a jury returns a verdict of guilty. In each of the three situations, guilt has been determined upon the acceptance by the court of the respective pleas or of the verdict of the jury. In each case, motions to withdraw the pleas or to set aside the verdict may be made, and might be granted, but their availability does not alter the fact that, until any such motion is granted, there has been a determination of guilt.

It appears rather unseemly to me for the Court to enlarge, through judicial decision, the time for filing motions in arrest and, in consequence, that for taking an appeal. Only last Term, we said in *United States* v. *Robinson*, 361 U. S. 220, 229 (1960), that this should be effected "through the rule-making process . . . ." As was pointed out there, Rule 45 (b) specifically provides that "the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal." The Court has, by today's opinion, enlarged the time provided in these Rules, contrary to their express provision, contrary to our prior cases, and contrary to the long-established practice at the Bar. In so doing, it places these Rules in a state of utter confusion, and must thereby surely drive the Bar and the trial courts to procedural distraction. I would affirm.